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In The Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether it was "appropriate," within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. 7607(f), to award over $90,000 in attorneys' fees and costs to parties who failed to prevail on any aspect of their challenge to regulations promulgated by the Administrator of the Environmental Protection Agency.*

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*The parties involved in the attorneys' fees litigation are solely those appearing in the caption of the case in this Court. This case began, however, as eight consolidated petitions for review under the Clean Air Act. At that stage of the proceedings, the litigants included a large number of other parties, mostly electric utilities, whose names are collected in Appendix D, *infra*, 41a–42a.

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SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–22a) holding the Administrator liable for attorneys' fees and costs is reported at 672 F.2d 33. The opinion of the court of appeals (App. B, *infra*, 23a–38a) determining the amount of those fees and costs is not yet officially reported.

JURISDICTION

The judgment order of the court of appeals (App. C, *infra*, 39a–40a) was entered on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), provides in pertinent part as follows:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

STATEMENT

Following a totally unsuccessful challenge to regulations promulgated by the Environmental Protection Agency (EPA), respondents Sierra Club and Environmental Defense Fund (EDF) sought an award of attorneys' fees and costs against the government under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). Although respondents had not prevailed on any issue in the litigation, the court of appeals determined that they were entitled to fees and costs. Before discussing the court's ruling on attorneys' fees, we briefly describe the underlying merits litigation.

1. Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, requires the EPA to set performance standards limiting emissions from new or modified air pollution sources that may be reasonably anticipated to endanger the public health or welfare. In 1979, EPA promulgated revised new source performance standards for coal-fired generators capable of firing more than 250 million British thermal units (MBtu) per hour.[1] The performance standards limited sulfur diox-

[1] A complete history of the rulemaking is set forth in the court of appeals' merits opinion, *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981), and need not be repeated here. As described by the court of appeals, the final new source performance standards regulated emissions of sulfur dioxide, particulate matter, and nitrogen oxides. Respondents, however, only challenged certain features of the sulfur dioxide standard. Ac-

ide (SO_2) emissions to a maximum of 1.2 pounds per MBtu. In addition, powerplants with potential, *i.e.*, uncontrolled, SO_2 emissions greater than 0.60 pounds per MBtu were required to reduce such emissions by 90%; powerplants with potential emissions less than 0.60 pounds of SO_2 per MBtu were required to reduce them by no less than 70%.

The Sierra Club, EDF, and industry organizations filed petitions for review of the new source performance standards in the United States Court of Appeals for the District of Columbia Circuit.[2] Sierra Club challenged EPA's action on three grounds: (1) that EPA lacked statutory authority to adopt a "variable" standard for SO_2 emissions, *i.e.*, a standard that allowed percentage reductions in emissions ranging from 70% to 90% (*Sierra Club* v. *Costle*, 657 F.2d 298, 316 (D.C. Cir. 1981)); (2) that EPA's standard was not supported by the rulemaking record (*id.* at 316–317); and (3) that EPA failed adequately to apprise the public of its intention to adopt a variable reduction strategy, thereby depriving the public of a fair opportunity to comment on the adoption of a variable standard in the final rule (*id.* at 317–318). EDF challenged the performance standards on only one ground—the alleged procedural impropriety of "*ex parte* contacts." EDF asserted that a more stringent SO_2 emission ceiling was attainable and would have been adopted but for an "ex parte blitz" on EPA after the close of the comment period, during which EPA was pressured not to adopt a more stringent standard (*id.* at 386).

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cordingly, the above description of the merits litigation is confined to that aspect of the new source performance standards.

[2] Jurisdiction in the court of appeals was properly predicated on Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1), which provides that judicial review of many of the Administrator's actions, including the promulgation of new source performance standards, may be had only in the United States Court of Appeals for the District of Columbia Circuit.

On April 29, 1981, the court of appeals rendered its decision on the merits. *Sierra Club* v. *Costle*, *supra*, 657 F.2d 298. The court rejected all of Sierra Club's claims. First, it concluded that EPA had ample statutory authority to adopt a variable standard (657 F.2d at 318-322). Second, it rejected Sierra Club's charge that the variable standard was without basis in the record. After reviewing the technical background for the standard, the factors considered by EPA in adopting the standard, and examining the agency's stated rationale, the court held that EPA's action was reasonable (*id.* at 322-352). Finally, the court rebuffed Sierra Club's claim that EPA's adoption of a variable standard was procedurally defective. The court found that the public in general and Sierra Club in particular had fair notice of and opportunity to comment on the agency's intention to adopt a variable standard (*id.* at 353-356).

EDF fared no better on its claim. The court separated the allegedly improper *ex parte* contacts into two categories for analytical purposes: (1) written comments submitted after the close of the comment period; and (2) meetings after the close of the comment period with the President and heads of other Executive Branch agencies, congressional representatives, and private parties (657 F.2d at 386-387). With respect to written comments received after the close of the comment period, the court held that nothing on the face of the Clean Air Act prohibited the agency from receiving and considering such materials as long as they were placed in the agency's rulemaking docket. All such materials had in fact been properly docketed in this case (*id.* at 397-400).

With respect to the meetings, the court again noted that they were not prohibited by the Act; indeed, the court thought that such meetings were desirable given

the importance of openness and accessibility on the part of public officials (657 F.2d at 400–401). The court further noted that summaries of seven of the nine contested meetings had been placed in the rulemaking docket, and held that this fully satisfied all statutory and due process requirements (*id.* at 386–410). A summary of one of the remaining two meetings was omitted from the docket through inadvertence. The court found that this was an honest error and that, in any event, the particular meeting was not of the type required to be entered on the rulemaking docket (*id.* at 404). The final meeting included the President and members of the White House staff. The court expressly recognized the President's constitutional authority to control and supervise executive policymaking and was hesitant to fashion any new rule that would impair the President's ability to fullfill this role (*id.* at 405–407). In this particular instance, the court found that since EPA did not base the rule on any information or data arising from the meeting, there was no justification for requiring it to be docketed on the rulemaking record (*id.* at 407).

Finally, the court noted that it could find no evidence of impermissible congressional pressure on EPA arising out of two meetings (both entered on the rulemaking docket) that the Administrator had with West Virginia Senator Robert Byrd. EDF's claim in this regard was rejected because it failed to present any evidence that Senator Byrd had sought to influence the rulemaking by injecting extraneous considerations into the agency's decisionmaking processes (657 F.2d at 408–410).

2. After losing every issue on the merits, Sierra Club and EDF, relying on Section 307(f) of the Clean Air Act, filed motions seeking awards of attorneys' fees and costs. Although settlement discussions were initiated between respondents and the Justice Department lawyer then assigned to the litigation, no agreement was ever consummated because the Assistant Attorney

General in charge of the matter declined to approve settlement. Thereafter, the fee requests were fully briefed by respondents and the government. Sierra Club and EDF both argued that an award of fees and costs was "appropriate" because they had conferred certain public benefits by bringing their unsuccessful lawsuits. Specifically, they contended that they had advanced the purposes of the Clean Air Act by enabling the court of appeals to construe the provisions of Section 111 of the Act, thus providing future guidance to EPA and the public as to how that provision should be interpreted and implemented. EDF also argued separately that litigation of the *ex parte* contacts issue had clarified the "rules of the game" as to contacts with agency officials during informal rulemakings. The government opposed any fee award whatsoever because respondents not only lost the litigation but failed to advance the purposes of the Clean Air Act in any concrete or tangible fashion.

On February 5, 1982, the court of appeals issued an opinion rejecting all the government's arguments in opposition to the motions for fees (App. A, *infra*, 1a–22a).[3] After examining the text of Section 307(f) and its legislative history, the court concluded that an award of fees was "appropriate" where the party

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[3] Actually, the court issued its opinion on January 22, 1982. That opinion was later withdrawn and a substitute opinion issued on February 5, 1982. On the same day, the court issued attorneys' fee decisions in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982) (petition for rehearing pending, No. 78–1006), and *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982) (petition for rehearing pending, No. 79–1580). The principal differences between the January and February *Sierra Club* opinions are that the February 5 opinion *adds* a footnote responding to Judge Wilkey's dissent in *Alabama Power Co.* v. *Gorsuch*, *supra*, 672 F.2d at 8–33, and *deletes* a passage cautioning that the amount of an award to "self-appointed representatives of the public interest" should be closely scrutinized.

seeking fees had "'substantially contributed' to the goals of the Clean Air Act" (App. A, *infra*, 20a n.10), whether or not the litigation was actually successful. The court further concluded that the express goals of the Clean Air Act included "prompt resolution of serious questions of statutory interpretation" (*id.* at 18a). A litigant could satisfy this goal, the court ruled, by making exemplary presentations on important, complex and novel issues (*id.* at 12a–13a, 18a–19a).

The court then suggested that the parties resume their negotiations over the proper amount of fees to be awarded, and ordered a status report on the negotiations within three months. In May 1982, the parties advised the court that their negotiations had been unsuccessful. Thereafter, Sierra Club and EDF filed amended fee requests encompassing their work on the case-in-chief and on the attorneys' fee dispute. On July 16, 1982, the court of appeals issued its final opinion (App. B, *infra*, 23a–38a). A majority of the panel determined that Sierra Club was entitled to an award of $44,715 in fees and $644.60 in expenses, and that EDF was entitled to an award of $45,874.80 in fees (App. C, *infra*, 39a–40a). Although the court made modest reductions in the number of compensable hours claimed by respondents, the majority awarded fees at the hourly rates respondents had requested and rejected the government's argument that the awards should be reduced to reflect respondents' total lack of success on the merits (App. B, *infra*, 26a–30a, 32a–35a). The majority stated that any such reduction could not be squared with "the Clean Air Act's overriding purpose of encouraging constructive legal challenges * * *" (*id.* at 30a). The court did, however, agree with the government that because of their failure to prevail respondents were not entitled to any "bonus" in addition to their "lodestar" fees (determined by multiplying the hours reasonably expended by a reasonable hourly rate) (*id.*

at 30a–31a). Judge Robb dissented in part, asserting that a reduction in respondents' lodestar fees was "appropriate" because respondents had "batted zero" and "[i]f counsel were private practitioners their clients might well complain that they could have lost the case for less money" (*id.* at 36a–37a).

REASONS FOR GRANTING THE PETITION

In holding the government liable for attorneys' fees incurred by litigants who do not prevail in any respect, the court of appeals has departed from accepted notions of fee-shifting, and has established a precedent that threatens to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation.[4] The court's decision, fur-

[4] The impact of the court's decision is not necessarily limited to attorneys' fee awards under Section 307(f) of the Clean Air Act. Some 13 other federal statutes contain virtually identical attorneys' fee provisions. See Toxic Substances Control Act, 15 U.S.C. 2618(d); Endangered Species Act of 1973, 16 U.S.C. 1540(g)(4); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. IV) 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. (Supp. IV) 1427(c); Clean Water Act, 33 U.S.C. 1365(d); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(4); Deepwater Port Act of 1974, 33 U.S.C. 1515(d); Safe Drinking Water Act, 42 U.S.C. 300j–8(d); Noise Control Act of 1972, 42 U.S.C. 4911(d); Energy Policy and Conservation Act, 42 U.S.C. 6305(d); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. IV) 8435(d); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. (Supp. IV) 9124(d); and Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. IV) 1349(a)(5). In light of this Court's decision in *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973), that similar attorneys' fee provisions should be interpreted pari passu, it is likely that the ruling below will be extended to claims arising under other statutes. Indeed, a separate panel of the court of appeals has already interpreted the attorneys' fee provision in the Toxic Substances Control Act to permit awards to non-prevailing parties, in part by reliance on the decision in this case. See *Environmental Defense Fund*,

thermore, disregards both settled principles of sovereign immunity and the congressional intent behind Section 307(f) of the Clean Air Act.

1. The court adopted a seemingly benign standard in this case, ruling that an award of attorneys' fees would be "appropriate" whenever a litigant "substantially contributed" to the goals of the Clean Air Act (App. A, *infra*, 20a n.10). There can be little dispute, moreover, that litigation resulting in proper implementation of the statute substantially contributes to Congress' goals. Where the court went fundamentally astray, however, was in its equation of proper implementation of the Clean Air Act with mere judicial "interpretation" of the statute (*id.* at 5a n.3, 8a, 11a, 18a). It is clear that Congress intended to hold the government liable for attorneys' fees in actions that spur proper implementation of the Act by correcting administrative errors (see pages 16–17, *infra*). But it is equally clear that judicial interpretation of the Act is not in itself a goal of the statute. Unless one views litigation as desirable for its own sake, it is difficult to comprehend how implementation of the Act is furthered when a court finds, in the course of interpreting the Act, that the Agency was already implementing it correctly.

Inc. v. *EPA*, 672 F.2d 42, 48 (D.C. Cir. 1982) (petition for rehearing on other grounds pending, No. 79–1580). The government does not plan to seek this Court's review of the decision in *Environmental Defense Fund* v. *EPA* because in that case EDF prevailed on three of the four issues it litigated on the merits; however, the opinion clearly sanctions an award to totally unsuccessful parties. The ruling in the present case is also having an immediate impact on other pending litigation. For example, the Energy Action Educational Foundation is now seeking attorneys' fees and costs under the Outer Continental Shelf Lands Act for its work in the district court, the court of appeals and this Court in *Watt* v. *Energy Action Educational Foundation*, No. 80–1464 (Dec. 1, 1981), notwithstanding the fact that this Court unanimously rejected Energy Action's position on the merits.

The court of appeals' elevation of judicial review to the level of a "goal" of the Clean Air Act is the sole basis for its conclusion that totally unsuccessful litigation is capable of yielding public benefits that justify an award of attorneys' fees. For example, the court stated that "by assisting judicial interpretation of the Clean Air Act, Sierra Club and EDF aided agency implementation and Congressional reevaluation of the Act" (App. A, *infra*, 8a) (footnote omitted). The Agency's implementation of the Act, however, was found to be in full accord with congressional intent, and it is therefore difficult to imagine that the Agency was aided in any way by judicial reaffirmation of its actions. As for congressional reevaluation of the Act, Congress has ample tools at its command to conduct that reevaluation without the assistance of litigants who press unsuccessful claims. The legislative history of Section 307(f) does not support the notion that it was designed to promote unsuccessful litigation for the edification of Congress.

The court below awarded attorneys' fees not only because the respondents brought "complex and novel" issues before it (App. A, *infra*, 13a), but also because "their assistance in the resolution of the issues was substantial" (*ibid.*). The court's reliance on the "substantial nature of petitioners' assistance" (*id.* at 16a), however, is insufficient to justify an award of attorneys' fees.[5] Surely the fact that a litigant's position, though wrong, was competently presented does not make fee-shifting appropriate.

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[5] The court of appeals' estimation of respondents' contribution to the litigation increased markedly between the time it rendered its decision on the merits and its opinion below. For example, in its opinion below the court praised EDF for assisting the court's deliberations on the *ex parte* contacts issue. In the opinion on the merits, however, the court stated that "the parties," presumably including EDF, did not make the court's task of identifying the actions and incidents that gave rise to EDF's complaints "an easy one." 657 F.2d at 386 n.423. The court stated (*id.* at 391):

The court stated that it "was totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard" (App. A, *infra*, 17a). But the court failed to point out that absent this litigation there would have been no need for judicial evaluation of the variable standard in the first place. Similarly, the court found that EDF's contributions expedited and "enriched" its consideration of the *ex parte* contacts issue, and allowed the court to "resolve close questions of interpretation for future rulemaking under the Act" (*id.* at 18a). The court's consideration, of course, was only necessary because EDF raised the *ex parte* contacts issue. Nothing in the Act, moreover, suggests that Congress meant to pay litigants to resolve questions that might not even arise until "future rulemaking[s]" (*ibid.*). An award of attorneys' fees is not "appropriate" merely because it furthers, even substantially, jurisprudential understanding.[6]

EDF does not specify which particular features in each of the above-numerated communications violated due process or constituted errors under the statute; indeed, EDF nowhere lists the communications in a form designed to clarify why any particular communication was unlawful. Instead, EDF labels all post-comment communications with EPA—from whatever source and in whatever form—as "ex parte," and claims that "this court has repeatedly stated that ex parte contacts of substance violate due process."

As noted, the court rejected EDF's position in its entirety (657 F.2d at 386–410). Similarly, the court had no difficulty rejecting Sierra Club's construction of the statute. The court found the language of the statute itself to be relatively clear (*id.* at 319), and concluded that it "critically undercut[]" Sierra Club's position (*id.* at 318). The court found Sierra Club's arguments based on the legislative history no more persuasive. See generally *id.* at 319–322.

[6] Seen in this light, the ruling in this case conflicts with the spirit of the Court's recent decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, No. 80–327 (Jan. 12, 1982). Reviewing the Article III re-

Congress assigned to EPA the expensive, time-consuming and important responsibility of implementing the Clean Air Act. When EPA missteps, Congress has encouraged private litigants to invoke judicial review to put the Agency back on course. But where EPA has not strayed, there is little logic to the assumption that Congress intended to pay self-appointed representatives of the public interest[7] to judicially reaffirm the Agency's actions. Respondents were, of course, free to take their disagreements with the Agency's approach to court, but they should not expect the government to pay them for having its course of action vindicated. Rewarding litigants who actually aid Agency implementation of the Clean Air Act by correcting administrative errors is sufficient incentive for the citizen involvement in the implementation of the Act that was contemplated by Congress. Rewarding unsuccessful litigants who do no more than vindicate the Agency's approach to the statute not only does nothing to assist implementation of the Act but, on the contrary, frustrates that purpose by diverting scarce Agency resources from more pressing needs.[8]

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quirements for standing to sue, the Court there emphasized that federal courts are neither "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding" nor "judicial versions of college debating forums." Slip op. 8. Yet it is precisely for the ventilation of public grievances and the refinement of jurisprudential understanding that respondents were awarded fees in this litigation.

[7] *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331, 1338–1339 (1st Cir. 1973).

[8] The court of appeals asserted that it would award fees to totally unsuccessful parties only in "exceptional" circumstances (App. A, *infra*, 13a). The court, however, provided no guidelines for ascertaining the "exceptional" case. Implementation of statutes like the Clean Air Act is inherently important and inev-

2. The lower court's liberal interpretation of Section 307(f) is inconsistent with certain fundamental considerations underlying the doctrine of sovereign immunity and the traditional rules governing the allocation of attorneys' fees. The court of appeals' departure from these traditional norms cannot be squared with the literal language of the statute, or its legislative history.

"[T]he United States, as soveriegn, 'is immune from suit save as it consents to be sued ***.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). The Court has emphasized that such consent "cannot be implied but must be 'unequivocally expressed.'" *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982), slip op. 6, quoting *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

Where Congress has waived sovereign immunity, its waiver is to be "construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, *supra*, 312 U.S. at 590. Thus, in interpreting a statute that waives the immunity of the United States, the courts should not "enlarge its liability *** beyond what the language requires." *Eastern Transportation Co.* v. *United*

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itably complex, and it will be a rare case that does not raise novel issues that a court, like the one below, might find worthy of resolution. See *id.* at 12a-13a. So long as the present ruling stands, therefore, it can only encourage substantial amounts of lengthy litigation that might otherwise not be brought, at great cost both to the courts and the Executive Branch.

States, 272 U.S. 675, 686 (1927). Strict construction conserves the public fisc and limits recovery to those situations in which it may be confidently concluded that Congress has determined that the government should be liable. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68–69 (1955). These principles are, of course, fully applicable to claims against the government for attorneys' fees.[9] *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267–268 & n.42 (1975).

In addition to the bar that sovereign immunity interposes to fee awards against the government, attorneys' fees generally are not available to parties who do not prevail on any claim.[10] Interpretation of the Clean Air

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[9] This Court's recent decision in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), illustrates how principles of sovereign immunity should impact upon Section 307(f)'s provision for attorneys' fees in "appropriate" cases. In *Lehman*, plaintiff sued the Navy under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a, which waived sovereign immunity for such suits. Plaintiff claimed she was entitled to a trial by jury. The Court noted that, in general, trial by jury is not available in suits against the United States. In light of this general rule, the Court held that "accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action." 453 U.S. at 162 n.9. The Court further explained that "even if the legislative history were ambiguous, that would not affect the proper resolution of this case, because the plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute." *Id.* at 168.

[10] As Judge Wilkey stated in his dissenting opinion in *Alabama Power Co.*, *supra*, 672 F.2d at 13:

> All precedent and statute points to the fair conclusion that there is a general presumption against one side (particularly the winner) paying the other's attorneys' fees. Thus, when in doubt, no award will be made. Dramatic deviations from the American rule will be construed against. Similarly, there is a presumption that non-prevailing parties are not entitled to costs.

Act to allow an award of fees to the Sierra Club and Environmental Defense Fund in this case contravenes this general rule. Such an interpretation should be particularly disfavored here because it increases the burden of the statute on the public fisc. See *Lehman* v. *Nakshian*, 453 U.S. 156, 161 n.8 (1981). Thus respondents' claims for fees should not be allowed unless the Court finds that Congress clearly and "unequivocally" departed from the general presumption against awarding fees to totally unsuccessful litigants. *Id.* at 160–161.

The government does not dispute that Congress has authorized attorneys' fees awards against the government. The legislative history of Section 307(f) clearly demonstrates that Congress meant to waive the government's traditional immunity and to overcome the presumption of the "American Rule" against fee-shifting. See H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 337 (1977) ("In adopting this provision concerning fees, the committee intended to meet the requirement for specific authorization imposed by 28 U.S.C. sec. 2412 and by the Supreme Court's ruling in *Alyeska* ***."). But Congress' decision to subject the government to attorneys' fee awards under Section 307(f) does not mean that it has consented to an award in the circumstances of this case. Nothing in the language or legislative history of Section 307(f) suggests that attorneys' fees may be assessed against the government in favor of unsuccessful suitors. It is highly unlikely that such a radical departure from both the American Rule on attorneys' fees and the general rules of construction governing waivers of sovereign immunity could have passed Congress with nary a mention, let alone a clear exposition of Congress' intent.

3. The court of appeals misinterpreted Congress' intent in enacting Section 307(f). The court concluded that Congress' decision not to employ a "prevailing party" standard in Section 307(f) necessarily meant that success on the merits was not a relevant inquiry. The government agrees that success on the merits, in the traditional sense of a favorable final judgment, is not a prerequisite for an award of fees under the statute. Nevertheless, Section 307(f)'s legislative history clearly indicates Congress' understanding that some tangible accomplishment is a prerequisite to eligibility for a fee award under the statute. There is little in the legislative history to support the court of appeals' conclusion that unsuccessful, albeit competent, litigation of novel or important issues is the sort of contribution to the administration of the Clean Air Act that Congress intended to reward with attorneys' fees.

a. Because the language of Section 307(f) does not identify what situations Congress thought might be "appropriate" for attorneys' fee awards, the court of appeals turned to the legislative history for guidance. The court erred, however, in confining its analysis to the legislative history of Section 307(f) alone. That section was not added to the Clean Air Act until 1977, and its meaning can only be determined by tracing its origins in the Clean Air Act of 1970.

In the 1970 Act, Congress authorized courts to award attorneys' fees in "appropriate" cases under Section 304(d), 42 U.S.C. (Supp. IV) 7604(d)—the so-called citizens' suit provision of the Act. That section allows citizens to bring enforcement actions directly against persons or entities alleged to be in violation of the Act or against the EPA Administrator for failure to perform a nondiscretionary duty. Congress' purpose in enacting this provision was to supplement government enforcement efforts and motivate government agencies to take

more vigorous enforcement actions themselves. As stated in the Senate Report (S. Rep. No. 91–1196, 91st Cong., 2d Sess. 36–37, 38–39 (1970)):

> Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.
>
> * * * * *
>
> The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary for failure to exercise his duties under the Act, including his enforcement duties. The Committee expects that many citizen suits would be of this nature, since such suits would reduce the ultimate burden on the citizen of going forward with the entire action.

Thus, Congress' purpose was to enlist the aid of citizens in those situations where the government was not living up to its responsibilities. It is against this backdrop that the Senate Report's explanation of the attorneys' fees provision in Section 304(d) must be evaluated (S. Rep. No. 91–1196, *supra*, at 38) (emphasis added):

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. [11] The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging

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[11] Section 304(d) initially provided for attorneys' fee awards when the court determined that such an award would be in the "public interest." See S. 4358, 91st Cong., 2d Sess. (1970). This was the version of the bill discussed in the Senate Report. The bill was later changed to authorize fees where "appropriate." There is no legislative history, however, to suggest that Congress meant anything substantive by the change.

> abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.
>
> The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For example, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

Congress was thus focusing on two concerns, neither of which supports the court of appeals' approach to the statute.[12] First, Congress wanted to protect prevailing defendants against the burden of having to oppose frivolous lawsuits. Second, Congress wanted to reward *legitimate* citizen suits. Although the court of appeals would apparently read "legitimate actions" as including those raising "important, novel or complex" issues (App. A, *infra*, 13a), it is clear from a careful reading of the entire passage that "legitimate actions" can only have meant *successful* actions. That is because the next sentence of the report states that fee awards should "*extend* to plaintiffs in actions which result in successful abatement but do not reach a verdict" (S. Rep. No. 91–1196, *supra*, at 38) (emphasis added). While Congress thus obviated the need for a plaintiff to "prevail" in the strictly technical sense of obtaining a judgment, it clearly did not remove the element of success in a practical sense, because a party still had to "win" in the sense of producing the desired result, albeit without a

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[12] Indeed, the first concern the "appropriate" standard was designed to deal with cuts against the award of fees in this case. Far from authorizing fees in favor of unsuccessful *plaintiffs*, the statute was designed to provide fees for successful *defendants*.

verdict. As Judge Wilkey put it in his dissent in *Alabama Power Co.* v. *Gorsuch*, *supra*, 672 F.2d at 15, 19, to be awarded attorneys' fees a party must at least not lose.[13] A fair reading of the Senate Report thus demonstrates that "abatement without final judgment" represents the limits of a court's discretion to award fees under Section 304(d) to non-prevailing plaintiffs.[14]

Although the court of appeals recognized the import of the 1970 Senate Report, it nevertheless stated that it did "not read the Report as ruling out all other instances where attorneys' fees would be appropriate"

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[13] The court of appeals' decision in *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981), is not authority to the contrary. At the time plaintiffs filed suit in that case, and for three years thereafter, the District of Columbia was in clear violation of its implementation plan under the Clean Air Act. Plaintiffs never obtained a favorable final judgment, however, because the District modified the plan, and EPA approved the revision, in such a way as to render the case moot. To the extent the court of appeals now reads this decision as sanctioning fee awards to totally unsuccessful parties (App. A, *infra*, 7a–10a), it is in error for the same reasons it erred in the present case.

[14] The report states that fee awards under Section 304(d) "extend to" situations where plaintiffs accomplish a tangible benefit short of judgment; the report does not imply that a fee award is proper when a litigant merely raises novel but unsuccessful contentions (S. Rep. No. 91–1196, *supra*, at 38). The summary "section-by-section" analysis of the Senate Report, however, states that a "court may award costs of litigation to either party whenever the court determines such an award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 91–1196, *supra*, at 65. There is no elaboration on the meaning of "without regard to the outcome of the litigation" but, in light of the more complete explanation of congressional intent at page 38 of the report, there is no reason to believe that Congress intended any radical departure from the notion that awards were to be made to plaintiffs who accomplished something concrete, such as abatement of a violation, yet failed to secure a favorable final judgment.

(App. A, *infra*, 4a n.3). Against the backdrop of sovereign immunity that should have informed the court's approach, however, it was not necessary for Congress to "rule out" categories of cases; rather, Congress must clearly and affirmatively "rule in" those situations where it meant to authorize fee awards. And, at least as of 1970, there is no clear indication that Congress contemplated fee awards to totally unsuccessful litigants.[15]

b. In addition to dismissing the 1970 Senate Report on the grounds that it did not "rule out" (App. A, *infra*, 4a n.3) the court's construction, the court of appeals held that it must focus its attention on the legislative history of the 1977 amendments, which added an "appropriate" attorneys' fee provision to Section 307 of the

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[15] The court of appeals was concerned (App. A, *infra*, 11a) with constructing a definition of "appropriate" that would go beyond the "prevailing party" standard that Congress had employed in other statutes, such as the Civil Rights Act of 1964, 42 U.S.C. 2000a–3, and the Civil Rights Act of 1968, 42 U.S.C. 2000e–5. However, the court of appeals overlooked the fact that as of 1970, the first time Congress employed the "appropriate" standard, the courts were narrowly construing "prevailing" to include only those parties that had obtained a favorable final judgment. It was not until 1976, for example, that courts began awarding attorneys' fees to civil rights plaintiffs who "prevailed" by means of a settlement rather than a litigated judgment. See, *e.g.*, *Foster* v. *Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976); *Richardson* v. *Civil Service Commission of New York*, 420 F. Supp. 64 (S.D.N.Y. 1976); *Parker* v. *Mathews* 411 F. Supp. 1059 (D.D.C. 1976); *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (E.D. Va. 1976). Thus, Congress' desire to reward parties whose litigation efforts had in fact achieved the result sought, albeit without a judgment, necessitated the adoption of some standard other than the "prevailing party" standard. The court of appeals thus erred in concluding (App. A, *infra*, 5a n.3, 11a) that if Congress had only meant to reward tangible accomplishments, it would not have drafted a new standard.

Act (App. A, *infra*, 4a–6a). The court, however, ignored the motivation behind Congress' 1977 amendment of Section 307.

In 1970, Congress had made no provision for awards of attorneys' fees in actions brought under Section 307, which provides for direct review in the courts of appeals of the Administrator's actions in promulgating regulations and approving state implementation plans. In *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973), the court was confronted with a request for attorneys' fees in an action brought under Section 307. The court found that Section 304, which permits suits against the Administrator for failure to perform a nondiscretionary duty, aptly covered the case before it, where the essence of the claim was that the Administrator failed to perform his duty with respect to the review and approval of state implementation plans. The court's problem, however, was that Section 304 citizens' suits may only be brought in district courts, while the case before it had to be filed in the court of appeals under Section 307. Using somewhat questionable logic, the court concluded that Section 307 did no more than specify the forum, and that a suit brought under Section 307 was really an action pursuant to Section 304. Accordingly, the court concluded that Congress had given the necessary authorization for an award of attorneys' fees in actions brought under Section 307. 484 F.2d at 1335–1338.

This conclusion was subsequently rejected by the Courts of Appeals for the Fifth and District of Columbia Circuits. *Natural Resources Defense Council, Inc.* v. *EPA*, 539 F.2d 1068 (5th Cir. 1976); *Natural Resources Defense Council, Inc.* v. *EPA*, 512 F.2d 1351 (D.C. Cir. 1975). Those courts concluded that Sections 304 and 307 contemplated distinct groups of cases and that Section 304's attorneys' fee provision could not be engrafted onto Section 307 actions.

These rulings led Congress to amend Section 307 in 1977 to include express authorization for the award of attorneys' fees in cases brought under that section whenever, as under Section 304, the court deemed such awards to be "appropriate." As the Senate Report explained (S. Rep. No. 95–127, 95th Cong., 1st Sess. 99 (1977)):

> The purpose of the amendment to Section 307 is to carry out the intent of the committee in 1970 that a court may, in its discretion, award costs of litigation to a party bringing a suit under Section 307 of the Clean Air Act.
>
> The law has been interpreted otherwise. Section 304 of the Clean Air Act specifically authorizes courts to award costs; however, section 307 did not contain a specific authorization. Courts have construed the absence of such authorization in section 307 to indicate congressional intent to prohibit a discretionary award of fees in section 307 suits.

It is thus clear that the congressional purpose behind the 1977 amendment to Section 307 was to conform that section to Section 304(d). The amendment does not reflect any change in Congress' understanding of when a fee award is "appropriate." Cf. *Northcross* v. *Memphis Board of Education*, *supra*. Thus, under Section 307, as under Section 304, a litigant must "at least not lose" in order to be eligible for a fee award. Fees are "appropriate" if a party prevails or if it accomplishes some tangible result, such as a voluntary agreement by the

Administrator to modify a regulation or adopt some other significant policy change.[16]

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[16] The legislative histories of other statutes containing provisions authorizing attorneys' fees where "appropriate" (see note 4, *supra*) are fully consistent with the government's view of the Clean Air Act. For example, the legislative history of Section 505(d) of the Clean Water Act, 33 U.S.C. 1365(d), shows that Congress specifically intended Section 505(d) to be interpreted similarly to Section 304(d) of the Clean Air Act. Indeed, the House Report simply states that fact. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 132-133 (1972). The Senate Report, S. Rep. No. 92-414, 92d Cong., 2d Sess. 81 (1972), reiterates the rationale of Section 304(d) of the Clean Air Act in language virtually identical to the Senate Report on the Clean Air Act. Thus, the twin purposes of Section 505(d) of the Clean Water Act are to punish frivolous or harassing litigants and to reward citizens' suits that result in pollution abatement but fail to reach a verdict. The legislative history of the Safe Drinking Water Act, 42 U.S.C. 300j-8(d), states that its attorneys' fee provision is designed "[as] a deterrent against frivolous suits." S. Rep. No. 93-231, 93d Cong., 1st Sess. 17 (1973). The legislative history of the attorneys' fee provision in the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. IV) 1270(d), specifically adopts the legislative history of Section 505(d) of the Clean Water Act. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 90-91 (1977). The legislative history of the Toxic Substances Control Act's attorneys' fee provision, 15 U.S.C. 2618(d), construed by the court of appeals in *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), is likewise fully consistent with the government's position here. Although the court of appeals relied heavily on a statement by Senator Tunney that fee awards under the TSCA would be appropriate "where such award is in the public interest without regard to the outcome of the litigation," 122 Cong. Rec. 8301 (1976), the court of appeals failed to analyze the cases Senator Tunney cited in support of that proposition. None of the four cases even remotely suggests the appropriateness of an award for litigating losing issues. Rather, in all four cases, the plaintiffs "prevailed" either in fact or by obtaining a concrete, tangible benefit for themselves or the class they represented in the form of a definite change in the defendant's conduct. *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1008-1009 (2d Cir. 1975); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 429-430 (8th Cir. 1970); *Thomas*

c. Rather than recognizing the narrow purpose behind Congress' amendment to Section 307, the court of appeals based its entire decision on the House Report accompanying the 1977 amendments. In pertinent part, that report provides as follows (H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 337 (1977)):

> The committee bill also contains express authority for the courts to award attorneys fees and expert witness fees in two situations.* The judicial review proceedings under section 307 of the act when the court determines such award is appropriate [sic].
>
> In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 [sic] (1st Cir. 1973).

*Such fees are already authorized to be awarded in suits brought under Section 304 of the Act.

The court of appeals ruled that whatever the policy behind Section 304 attorneys' fees actions this language

v. *Honeybrook Mines, Inc.*, 428 F.2d 981, 985 (3d Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Or. 1969). The court of appeals in *Environmental Defense Fund, Inc.* also glossed over Senator Tunney's statement that "the court should follow prevailing case law which holds that a *successful* plaintiff 'should ordinarily recover an [sic] attorneys' fees' * * *" (122 Cong. Rec. 8300 (1976) (emphasis added)).

"shows that Congress in 1977 specifically adopted the far broader policy of rewarding substantial contributions to the statutory goals of the Act" (App. A, *infra*, 4a–5a, n.3). Close examination of the House Report, however, reveals several flaws in the court's reasoning.

First, the initial paragraph, like the 1977 Senate Report, shows only an intent to have Section 307 parallel the existing attorneys' fee provision in Section 304. Second, the next paragraph quite clearly limits itself to actions under Section 307, and does not speak to Section 304 actions. It would be curious indeed if Congress really meant to adopt a "far broader policy" for Section 307 actions; indeed, such a result cannot be squared with the Senate Committee's explanation of the need to amend Section 307 simply to bring it into harmony with Section 304. S. Rep. No. 95–127, *supra*, at 99. Cf. *Northcross* v. *Memphis Board of Education*, *supra*. Yet the result of the court of appeals' ruling is that Section 307 litigants need not accomplish anything tangible in order to recover attorneys' fees, while Section 304 litigants must at a minimum achieve some tangible result short of judgment. Finally, the House Committee's language about encouraging "proper implementation of the act" does not suggest that unsuccessful litigation contributes to proper implementation. To the contrary, litigation that promotes "proper implementation of the act" is quite obviously akin to the "legitimate actions" contemplated by Congress in 1970. See S. Rep. No. 91–1196, *supra*, at 38, at page 18, *supra*.

Since the language of the House Report itself does not support an award of attorneys' fees to unsuccessful litigants, it is necessary to analyze the First Circuit's decision in *Natural Resources Defense Council, Inc.* v. *EPA*, upon which the House Committee "largely" relied (H.R. Rep. No. 95–294, *supra*, at 337). Again, a close reading of the case does not support the conclusions reached by the court below. The primary issue in

National Resources Defense Council, Inc. v. *EPA* was whether fees could *ever* be awarded to a Section 307 litigant since, at the time of the decision, Section 307 did not explicitly authorize fee awards. See page 21, *supra*. Only after resolving that question in NRDC's favor did the court turn to a brief examination of the "appropriateness" of a fee award. On this issue, the court was faced with a very narrow question—should it award *any* fees where the petitioners had prevailed on most but not all of the claims they had raised. In resolving this issue, the court turned to the legislative history of Section 304(d) which, as we have noted, contemplates awards to successful plaintiffs or to plaintiffs who accomplish something concrete short of judgment. Against this backdrop, the court stated (484 F.2d at 1338) (emphasis added):

> We are not impressed by the government's argument that because *some* issues were decided adversely to petitioners each party should bear its own costs. * * * We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.
>
> Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the right to award costs and fees in favor of the EPA. But the challenges here, even those not sustained,

were mainly constructive and reasonable. *And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.*

Thus, on its face, the First Circuit's opinion is far narrower than the court of appeals here suggested. NRDC *won* major portions of its case; nothing in the First Circuit's opinion suggests that fees would still have been awarded had NRDC failed to prevail on a single issue. The court's dictum about petitioners' "watchdog" role cannot be considered in isolation; rather, it must be examined in light of the government's contention that because NRDC lost *some* issues it should be denied *any* fee award. 484 F.2d at 1338. Only in this limited sense can the First Circuit be said to have rejected a "prevailing party" standard,[17] and there is nothing in the 1977 House Report's citation to *NRDC* v. *EPA* to suggest that it meant to go beyond this holding.

In short, the court of appeals has adopted an erroneous standard unsupported by the plain language of Section 307(f) or its legislative history. The case has worked a virtual revolution in the traditional law of attorneys' fees, in purported reliance on congressional intent. It is unlikely, however, that such a revolution would have occurred in Congress without anyone noticing it. In light of the guiding principles of sovereign immunity and the general presumption against fee awards to unsuccessful litigants, Congress clearly has not spoken in the certain and unequivocal terms required to support the court of appeals' decision.[18]

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[17] Moreover, at the time of the First Circuit's supposed rejection of a "prevailing party" standard, that standard was still being narrowly construed by the courts. See note 15, *supra*.

[18] The court of appeals also overlooked the fact that Congress has in fact spoken clearly when it meant to award attorneys' fees for the mere presentation of views. In Section 6(c)(4)(A) of the Toxic Substances Control Act, 15 U.S.C. 2605(c)(4)(A), Congress authorized EPA to award reasonable attorneys' fees to

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1982

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persons participating in rulemaking proceedings under the Act. That statute clearly demonstrates that Congress knew how to draft language awarding fees for the mere presentation of issues and viewpoints, whether or not those viewpoints were ultimately adopted. Under the statute, a rulemaking participant may be awarded fees if that participant "represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding." 15 U.S.C. 2605(c)(4)(A)(i). In deciding what persons represent such an interest, EPA is to take into account "the number and complexity of such issues and the extent to which representation of such interest will contribute to widespread public participation in the proceeding and representation of a fair balance of interests for the resolution of such issues." 15 U.S.C. 2605 (c)(4)(A). Clearly, these statutory directives make it appropriate for EPA to compensate persons whose contribution to the public interest lies simply in adding to the variety of public debate on an issue. Nothing remotely comparable can be read into the "appropriate" standard at issue in this case.

It is also worth noting that the same Congress that passed Section 307(f) of the Clean Air Act refused to pass a portion of the 1978 Nuclear Regulatory Commission appropriations bill that would have expressly provided for attorneys' fees for unsuccessful proponents of worthy causes before the NRC. Act of Nov. 6, 1978, Pub. L. No. 95-601, 92 Stat. 2947 *et seq.*, discussed in H.R. Rep. No. 95-1089 (Pt. 2), 95th Cong., 2d Sess. 2-3, 22-24 (1978). The rejected section, Section 275(a), appears at pages 2-3 of that House Report.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, RESPONDENT

NATIONAL COAL ASSOCIATION
ALABAMA POWER ASSOCIATION, ET AL., INTERVENORS

And Consolidated Case Nos. 79–1719, 79–1867, 79–1874, 80–1187, 80–1201, 80–1213, and 80–1338

On Motion for Award of Attorneys' Fees

Decided February 5, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges*.

Opinion *Per curiam*.

PER CURIAM: The Sierra Club and the Environmental Defense Fund ("EDF"), petitioners in *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (hereinafter *Sierra Club*), seek an award of attorneys' fees for their participation in an unsuccessful appeal of certain Environmental Protection Agency ("EPA") regulations, 44 Fed. Reg. 33580 (June 11, 1979), promulgated pursuant to the Clean Air Act, 42 U.S.C. §§ 7301 *et seq.* (1979

Supp. III). We find that under section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f), this is an "appropriate" case for the court to award attorneys' fees.

Prior to August, 1981 (when EPA apparently adopted a policy of blanket opposition to all petitions for attorneys' fees by non-prevailing parties[1]), Sierra Club and EDF were actively engaged in negotiations with EPA over the amount of attorneys' fees. Therefore, we hold here only that attorneys' fees may be awarded to nonprevailing parties under Section 307(f) and that such an award to Sierra Club and EDF in this case is appropriate, and we suggest that the parties resume their negotiations over the amount. If settlement proves impossible, the parties may return here for resolution of this matter.[2]

I. Authority Under Section 307 (f) to Grant Attorneys' Fees to Non-Prevailing Parties

Section 307(f) of the Clean Air Act provides that

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines that such an award is appropriate.*

42 U.S.C. § 7607(f) (emphasis added). An award of attorneys' fees under the Clean Air Act is not limited to "substantially prevailing" parties. *Compare* 42 U.S.C. § 7607(f) *with* 5 U.S.C. § 552(a)(4)(E) (awards in FOIA cases available only to a complainant who has substantially prevailed). On its face, the statutory provision

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[1] *See* Affidavit of David J. Lennett (September 22, 1981).

[2] *See* Response For The United States To The Sierra Club's Amended Request For Attorneys' Fees (government support for this approach); *cf.* United States v. American Telephone and Telegraph Co., 551 F.2d 384, 394 (D.C. Cir. 1976) (where this court suggested that the parties resume negotiation because of the recognized difficulty of appellate court resolution).

clearly permits the court to award attorneys' fees to prevailing, substantially prevailing, or non-prevailing parties in "appropriate" cases.

The legislative history of section 307(f) confirms this reading and offers guidance in identifying "appropriate" cases. The House Report, H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* 1977 U.S. Cong. & Adm. News 1077, 1416, states:

> In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973).[3]

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[3] Although adding little to our understanding of legislative intent, the Senate Report, S. Rep. No. 95–127, 95th Cong., 1st Sess. 99 (1977), also confirms our reading:

> Courts may award reasonable attorneys fees to any party against whom EPA acts unreasonably in initiating an enforcement action. Attorneys fees and other costs may also be awarded in judicial review proceedings brought under section 307 of the Clean Air Act whenever the court determines that such an award is appropriate.

The passage explicitly sanctions awards when EPA (1) acts unreasonably in initiating an enforcement action, and (2) when the court otherwise determines that an award is appropriate.

The government has suggested that the legislative intent of section 307(f) cannot be gleaned by working with the 1977 legislative records only. It argues that section 307(f) was meant to parallel section 304(d) of the Clean Air Act, and so the legislative history of that provision too must be consulted. The pur-

The passage from Judge Campbell's opinion in *National Resources Defense Council* v. *Environmental Protection Agency*, 484 F.2d 1331, 1338 (1st Cir. 1973) (hereinafter *NRDC*), endorsed in the House Report, reads:

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pose of section 304(d), the government notes, was to punish "frivolous or harassing litigation, and [to reward] citizens suits which result in pollution abatement, but fail to reach a favorable verdict." Reply Brief For The United States On The Issue Of Attorneys' Fees For Losing Parties Under 42 U.S.C. 7607(f) at 8. In support, the government cites S. Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970), which states:

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.
>
> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the court should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

While the only example of a non-prevailing party awarded attorneys' fees expressly cited in the Report is one where the case was mooted by abatement, we do not read the Report as ruling out all other instances where attorneys' fees would be appropriate. And, in any case, we cannot disregard the clear legislative history *specific* to section 307, noted in the text. *See* pp. 4–6 *infra*. That history shows that Congress in 1977 specifically adopted the far broader policy of rewarding substantial contributions

> The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and uncharted dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself complex and novel. Given the implementation dates, its early interpretation is desirable.

For Judge Campbell, and apparently for Congress, it was not enough merely to consider "who won." The

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to the statutory goals of the Act. In 1977 Congress made a clear choice between two different attorneys' fees provisions. *Compare* S. 252 ("In any judicial proceeding under this Act in which the United States ... is a party ... any party other than the United States *which prevails* in such action shall recover ... reasonable costs ... including reasonable attorneys' fees. ... In any case in which such party *prevails in part*, the court shall have discretion to award such reasonable costs." (Emphasis added.)) *with* S. 253 ("In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."). *Reprinted in* 5 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, 3644, 3817 (1978) (hereinafter LEGISLATIVE HISTORY). During Congressional hearings, areas of controversy on the issue of attorneys' fees included questions about whether there was any need to modify existing judicial practice and whether awards ought to be based on need rather than on the judicial disposition of the suit. *Id.* at 3893.

This legislative history makes it difficult to escape the conclusion that the statutory goals of the Clean Air Act can be furthered by parties who make a substantial contribution to the interpretation and development of the Act, *see* pp. 12–13, *infra*, as well as by substantially prevailing parties and parties who win a favorable result other than by receiving a favorable verdict. *See* pp. 10–13 *infra*.

benefits conferred by the litigation were an equally important consideration.[4]

The government here seeks to distinguish *Sierra Club* from *NRDC*, and thereby to pull this case beyond the purview of the plain language and the intent of the statutory provision, by arguing that the party awarded attorneys' fees in *NRDC* prevailed on *some*, although not on all issues. *See* Brief For The United States On The Issue of Attorneys' Fees For Losing Parties Under 42 U.S.C. 7607(f) at 11. The passage from *NRDC* reprinted above cannot, however, be read so narrowly. It indicates that the relevant inquiry is whether the lit-

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[4] *NRDC* at 1338. *See also* Delaware Citizens For Clean Air Inc. v. Stauffer Chemical Company, 62 F.R.D. 353, 355 (D. Del. 1974):

> [I]t is fair to conclude from the language chosen by Congress that ultimate success in a citizen's suit was not intended to be a prerequisite to an award. At the same time, however, in light of the absence of any more specific declaration of congressional intent, I believe that "appropriate" should be read in the context of the pre-existing notions about the circumstances under which one party may fairly be required to bear his adversary's costs of litigation. In this context it seems to this Court that success or failure must be given substantial weight and that an award of counsel fees to a losing party should be reserved for those cases in which either the litigation, though ultimately unsuccessful, serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor. The exercise of the equitable judgment thus called for must be made in light of all the actions of both parties during the course of litigation as well as during the relevant preceding period.

In considering the "appropriateness" of an award, the court also inquired into plaintiff's motives in bringing the suit and whether the suit was substantial or frivolous. It is thus clear that when Congress enacted the "appropriateness" standard in 1977, it was not surveying an empty field.

igation—successful or not—furthered the goals of the Act. It was this general policy which Congress sought to codify in the 1977 Amendments of the Clean Air Act.[5]

Our reading of the legislative history is supported by recent decisions of this court and the district court for the District of Columbia. In *Metropolitan Washington Coalition for Clean Air* v. *The District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981) (hereinafter *Washington Coalition*), this court reversed a decision of the district court, which, although acknowledging that unsuccessful parties may be awarded attorneys' fees under the Clean Air Act, found no public benefit from the lawsuit because the challenged operation of a municipal incinerator was ultimately determined not to endanger public health. The district court also found that the suit had "questionable legitimacy" because EPA was already considering revisions of the District of Columbia implementation plan and therefore the non-prevailing party's efforts "did not serve to expedite the Administrator's decision." This court reversed and remanded because:

> the District court incorrectly focused its attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision. ... Quite obviously, the legislature, when it called for citizen-suits, considered a fee recovery to be consonant with the public interest whenever the underlying suit was a prudent and desirable effort to achieve an unfulfilled objective of the Act. The attorneys' fee feature was of-

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[5] Further, it should be noted that in *Sierra Club* the agency's response to several challenges asserted by the utilities was effectively supplemented by the efforts of the environmental groups. *See* pp. 15–18 *infra*.

> fered as an inducement to citizen-suits, which Congress deemed necessary; and if the hope Congress had for such suits is to become a reality, decisions of fee allowance cannot make wholesale substitutions of hindsight for the legitimate expectations of citizen plaintiffs.

Id. at 804. It is true that in *Washington Coalition* we noted that at the time the suit began there may have been "a well founded expectation that the suit would bring about a more timely compliance with the [implementation] plan, and in that fashion an observance of the [Clean Air] Act." *Id.* at 805. The government therefore suggests that we read *Washington Coalition* to permit awards of attorneys' fees to "non-prevailing parties" only in those situations where, except for intervening events, the litigation would have been successful. Although the government's reading is snugly fit to the facts of *Washington Coalition*, that reading is not properly tailored to the case's rationale. We find the rationale of *Washington Coalition* to be broad enough to cover a case like *Sierra Club* where the non-prevailing parties had a "well-founded expectation" of success when their suit was brought—the issues were not frivolous but substantial—and where the appeal furthered the goals of the Act by facilitating the prompt resolution of the important and complex issues confronting this court involving the Act's interpretation. Moreover, by assisting judicial interpretation of the Clean Air Act, Sierra Club and EDF aided agency implementation and Congressional reevaluation[6] of the Act.

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[6] *See* 42 U.S.C. § 7626. Congress is presently considering revisions. *See, e.g.*, H.R. 1431, 97th Cong., 1st Sess. (1981); *see generally*, L. LAVE & G. OMENN, CLEARING THE AIR: REFORMING THE CLEAN AIR ACT (1981); E. HASKELL, THE POLITICS OF CLEAN AIR: EPA STANDARDS FOR COAL-BURNING POWER PLANTS (1982); Pedersen, *Why The Clean Air Act*

Our decision in *Washington Coalition* took note of Judge Richey's opinion in *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976) (hereinafter *Citizens Ass'n*). The issue presented there was "whether Plaintiffs, who were unsuccessful in a suit brought under the Clean Air Act, 42 U.S.C. §§ 1857 *et seq.*, should be awarded costs and attorneys' fees." *Id.* at 143. After trial, the district court concluded that the plaintiffs had not successfully proved a violation of the Act. Nevertheless, understanding Congress to have intended courts to award attorneys' fees in appropriate cases to unsuccessful as well as successful parties, the district court granted plaintiffs' request because the litigation had furthered the Act's purpose of encouraging citizen suits to accelerate enforcement of the Clean Air Act. In support of its holding the court noted that the case was one of first impression in the circuit, extensive preparation was required, nonfrivolous claims were raised, and the suit was brought in the face of a clean air regulatory vacuum in the District of Columbia.[7]

Works Badly, 129 U. Pa. L. Rev. 1059 (1981). On the status of the revisions see N.Y. Times, Jan. 4, 1982 at B–8.

[7] *Id.* at 145. More recently, District Judge Robinson granted attorneys' fees to unsuccessful plaintiffs who had brought suit under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331 *et seq.* North Slope Borough v. Andrus, 515 F. Supp. 961 (D.D.C. 1981). (The case is presently before this court on appeal.) Both ESA, 16 U.S.C. § 1540(g)(4), and OCSLA, 43 U.S.C. § 1349(a)(5), contain attorneys' fees provisions virtually identical to the one contained in the Clean Air Act. 16 U.S.C. § 1540(g)(4) provides:

> The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and ex-

It is clear from the foregoing review that whether Sierra Club and EDF are entitled to attorneys' fees turns not on whether they have prevailed in whole or in part,

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pert witness fees) to any party, whenever the court determines such award is appropriate.

43 U.S.C. § 1349(a)(5), provides, in relevant part:

> A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate.

The district court had found violations of both ESA and NEPA, but not OCSLA, and had determined that an award of attorneys' fees was appropriate. This court reversed, finding no statutory violations. North Slope Borough v. Andrus, No. 80–1148 (D.C. Cir. October 9, 1981). The attorneys' fees award was neither challenged in nor disturbed by this court. Thereafter, the parties entered into negotiations over the amount of the award. On January 21, 1981, a Stipulation of Settlement was filed, but before court approval, it was withdrawn. On February 3, 1981, the district court, after listening to essentially the same arguments presented here, reaffirmed its ruling that plaintiffs were entitled to attorneys' fees. North Slope Borough v. Andrus, 507 F. Supp. 106 (D.D.C. 1981). Judge Robinson observed:

> The "appropriateness" of an attorneys' fees award is determined by analyzing whether "the underlying suit was a prudent and desirable effort to achieve an unfulfilled objective of the Act." The appropriateness of a fee award may thus be viewed on a continuum—some suits will reflect more "prudent and desirable effort[s]" than others. . . . Denial of an award of attorneys' fees in this action would throw the issue of entitlement under the applicable statutes completely into disarray. In fact, denial of a fee award could only be supported by the application of the "substantially prevailing party" standard. This would require amending the ESA and the OCSLA, a task beyond the power of the Court. The Court once again affirms Plaintiffs' entitlement to attorneys' fees.

North Slope Borough v. Andrus, 515 F. Supp. at 965 (footnotes omitted).

but on whether they have served the goals of the Clean Air Act. The government's current position, that non-prevailing parties are not entitled to attorneys' fees, conflicts with the language and history of section 307 and judicial precedent. Under the government's position, there would have been no need to abandon the "substantially prevailing" standard commonly used to guide judicial awards of attorneys' fees. *See* p. 3 *supra;* n.8 *infra*. Clearly Congress meant something more by the provision in the Clear Air Act: it intended to encourage the participation of "public interest" groups in resolving complex technical questions and important and difficult questions of statutory interpretation, and in monitoring the prompt implementation of the Act.

We hasten to alleviate the government's concern that because implementation of the Clean Air Act is so complex, no challenge will appear frivolous and so all non-prevailing parties will automatically be awarded attorneys' fees. We believe that courts confronted with complex cases will be able to distinguish appropriate

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For a similarly worded statutory provision, see the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2618(d):

> The decision of the court in an action commenced under subsection (a), or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witness if the court determines that such an award is appropriate.

Environmental Defense Fund v. Environmental Protection Agency, Nos. 79–1811 & 79–1816 (D.C. Cir. Feb. 5, 1982), interprets this provision in a manner consistent with this opinion. *See also,* Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 1427(c); Clean Water Act, 33 U.S.C. §§ 1365(d), 1415(g)(4), 1515(d), Safe Drinking Water Act, 42 U.S.C. § 300j8(d); Noise Control Act, 42 U.S.C. § 4911(d); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d).

cases.[8] In this case, although the parties awarded fees did not *substantially prevail*, they did *substantially contribute* to the goals of the Act: the issues they ad-

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[8] Thus even a prevailing or substantially prevailing party who does not substantially contribute to the goals of the Clean Air Act may not be entitled to attorneys' fees. In this respect, the "substantially contributing" standard of the Clean Air Act resembles the "substantially prevailing" standard of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E), which provides:

> The court *may* assess against the United States reasonable attorney fees and other costs *reasonably incurred* in any case under this section in which the complainant has *substantially prevailed*.

(Emphasis added.) FOIA presents two questions for courts determining whether to award fees and costs: (1) is the plaintiff *eligible* for an award, and (2) is the plaintiff *entitled* to an award. Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 870 (D.C. Cir. 1981); Church of Scientology v. Harris, No. 80–1189 (D.C. Cir. April 17, 1981) (hereinafter *Harris*), slip op. at 8; Cox v. U.S. Dept. of Justice, 601 F.2d 1, 6 (D.C. Cir. 1979) (hereinafter *Cox*). To be eligible for an award under FOIA, the plaintiff must demonstrate (1) that the prosecution of the action could be reasonably regarded as necessary, and (2) that the action had a substantial causative effect on the delivery of the documents. *Harris* at 8, 11; *Cox* at 6. Determination of whether a plaintiff is entitled to an award is, nowever, within the sound discretion of the court. *See Harris* at 13 ("the decision as to whether to award fees and costs to an eligible party rests in the sound discretion of the district court."); Fenster v. Brown, 617 F.2d 740, 742 (D.C. Cir. 1979) ("Congress, in authorizing the award of attorneys' fees, left to the traditional equitable discretion of the courts the decision whether such fees are appropriate in any given disclosure case."); *Cox* at 7 ("A decision on whether to award attorneys' fees to an eligible party resides in the discretion of the district court . . ."); Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 715 (D.C. Cir. 1977) ("The touchstone of a court's discretionary decision under section 552(a)(4)(E) must be whether an award of attorney fees is necessary to implement

dressed were important, complex and novel; their assistance in the resolution of the issues was substantial and not duplicative of the efforts of other parties; and the caliber of their written and oral presentations was exemplary. While the occasions upon which non-prevailing parties will meet such criteria may be exceptional, *see American Petroleum Institute v. Costle*, No. 79–1104 (D.C. Cir. October 27, 1981) (denial of request for attorneys' fees), *Sierra Club* is such an occasion.

II. The Appropriateness of an Award of Attorney's Fees

A. *The Importance of the Case and the Issues Involved*

Sierra Club v. *Costle* was a significant case involving an EPA rule governing sulfur dioxide and particulate emissions from fossil-fueled electric utility plants across the nation. We described its impact in our opinion as follows:

> The importance of the challenged standards arises not only from the magnitude of the environment and health interests involved, but also from the critical implications the new pollution controls have for the economy—at the local and national levels. Further heightening the significance of this controversy is the crucial role coal burning power

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FOIA."); Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977) ("Although a complainant may have substantially prevailed in an action, the award of costs and attorney fees does not automatically follow. There are other factors which the court should consider in determining the appropriateness of an award of costs and attorney fees." (Footnotes omitted.)). As in the case of FOIA, by enacting the attorneys' fees provision of the Clean Air Act, Congress has given courts broad discretion. *See* Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 262 (1974) ("the circumstances under which attorneys' fees are to be awarded *and the range of discretion of the courts in making those awards* are matters for Congress to determine." (Footnote omitted; emphasis added.)).

plants are expected to play in our nation's effort to cope with the problems associated with energy scarcity.[8]

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[8] The significance of this case is reflected to some degree in a spate of recent articles. *See* Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 Yale L.J. 1466 (1980). Ackerman and Hassler's article appears in expanded form as a book entitled *Clean Coal/Dirty Air: or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High Sulfur Coal Producers and What Should Be Done About It* (Yale Univ. Press 1981); Banks, *EPA Bends to Industry Pressure on Coal NSPS—and Breaks*, 9 Ecology L.Q. 67 (1980); Currie, *Direct Federal Regulation of Stationary Sources Under the Clean Air Act*, 128 U. Pa. L. Rev. 1389 (1980); Navarro, *The Politics of Air Pollution*, Public Interest, Spring 1980, 36–44; *see also New Source Performance Standards for Coal-Fired Power Plants*, 8 Ecology L.Q. 784 (1980); *Reconciling Coal Conversion Policy and Significant Deterioration of Air Quality*, 15 Tulsa L.J. 532 (1980).

See generally Report of the National Commission on Air Quality, *To Breathe Clean Air* (1981); Del. Duca, *The Clean Air Act: A Realistic Assessment of Cost Effectiveness*, 5 Harv. Env. L. Rev. 184 (1981); Smith, *The Fight Over Clean Air Begins*, SCIENCE, March 20, 1981. 1328–30.

Sierra Club, 657 F.2d at 313. Our assessment of the case's importance to the national welfare was shared by all parties in the case.[9] The technical complexity of the

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[9] *See, e.g.*, EPA Brief at 5–6 ("this regulation will reduce sulfur dioxide emissions by half, particulate matter emissions by 70 percent ... New coal-fired plants will be several times cleaner than existing plants ... These benefits will cost billions ... In addition, the ... standard ... will prod the development of a technology that is cheaper, more reliable, more energy efficient, less water demanding and more environmentally sound overall."); Brief for Intervenor-Respondent National Coal Association at 4 ("The Standards have a major impact on the type and quality of coal which can be used by new generating plants, as

case necessitated extensive preparation by the parties and the court. In formulating the regulation, EPA had prepared 120 studies, collected 400 items of reference literature, received almost 1,400 comments, written 650 letters and 200 interagency memoranda, held over 50 meetings and substantive telephone conversations with the public, and conducted four days of public hearings. The statement accompanying the regulation took up to 43 triple columns of single-spaced type. Approximately 700 pages of briefs were submitted to this court on the merits of the case. The joint appendix contained 5,620 pages, bound in twelve volumes. The certified index to the record listed over 2,520 submissions. Seven months after oral argument, this court emerged with a 250 page opinion upholding the agency's regulations.

Among the serious questions presented or addressed by Sierra Club and EDF in the appeal were: (1) Whether section 111 of the Clean Air Act as amended in 1977 authorized EPA to promulgate a variable percentage

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well as on the marketability and competitive position of coal compared to other fuels. In some cases the Standards also have a significant bearing on methods of mining and processing coal."); Appalachian Power Co. Brief at 59 ("If Electric Utilities are correct that compliance with the 90 percent standard entails substantial risks, a large percentage of the coal reserves in Illinois, Indiana, Western Kentucky, Ohio and West Virginia may be eliminated as a boiler fuel. In addition, fewer new coal fired plants may be built as a result of the disincentives to high sulfur coal use. Finally, if fewer plants are built, additional emissions and oil consumption will result from increased reliance on older coal and oil-fired plants."); Brief of Intervenor Missouri Association of Municipal Utilities at 10. ("The establishment of a variable standard makes the use of dry technology economically feasible at the stage of implementation of the technological control requirement. . . . [R]elatively small utilities, such as the municipal systems which make up MAMU, will be able to continue use of locally available medium sulfur coal at a much more reasonable cost to their customers.").

reduction standard rather than a uniform reduction standard, and if so whether variability could be based upon the sulfur content of the coal burned. (*Sierra Club* provided the first major occasion for judicial interpretation of this newly revised provision in the 1977 Amendments to the Clean Air Act, and so demanded not only a microscopic examination of the legislative history but also a detailed review of the practical effects of a variable standard.) (2) Whether a variable standard could be issued in order to encourage new technology, *i.e.*, dry scrubbing. (This issue required extensive analysis of the record, as well as statutory interpretation of the relationship among several newly amended sections of the Clean Air Act.) (3) Whether EPA's econometric computer model, used to forecast the future impacts of alternative standards, was reliable, and whether the assumptions underlying the model were valid. (Our ruling on this question will inevitably affect agency procedures in a number of substantive contexts.) (4) Whether a 90% reduction of sulfur dioxide was technologically feasible. (A challenge to feasibility was brought by the utilities and defended by the environmental groups as well as EPA.) (5) Whether EPA's adoption of a 1.2 lbs./MBtu emissions ceiling was procedurally defective because of post-comment period contacts. (This was the first comprehensive judicial application of section 307(d) of the Clean Air Act, which legislated a complete set of guidelines for rulemaking under that Act.) None of these issues was remotely frivolous; all deserved to have been aired, and having been aired will contribute both to the agency's future efforts to implement the Clean Air Act and to Congress' ongoing review of the Act.

B. *The Substantial Nature of the Petitioners' Assistance*

Although it seems almost inconceivable that a major

review of the rule could have been conducted without questioning EPA's authority and evidentiary basis for promulgating a variable percentage reduction standard, an issue that the EPA Administrator had referred to at the start of the rulemaking as the "main" issue in the proceeding, Sierra Club was the only party to raise it. The court was thus totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard. Without Sierra Club, an issue conceded by EPA to be critically important would not have been raised or decided during the first judicial challenge to the statutory provision. The absence of debate on the issue, moreover, could have affected the outcome of other related issues in the case, *e.g.*, the proper level of total emissions (the so-called 1.2 lb./MBtu standard), since individual standards of section 111 operate interdependently. And the argument pressed most intensely by the utilities, that a 90% reduction in sulfur emissions was technologically infeasible given the state of antipollution technology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decisions on other parts.

Similarly, the critical role played by EDF in the court's premier interpretation of the new rulemaking procedures laid down in the 1977 Amendments must be recognized. This first comprehensive judicial interpretation of section 307(d) of the Clean Air Act consumed 60 pages of the court's opinion and involved detailed challenges to several facets of the rulemaking. EDF's contribution involved factual research into meetings and communications between agency officials, White House personnel, members of Congress and industry representatives, as well as a legal analysis of the propriety of such meetings under the new section 307 and existing case law on *ex parte* contacts in rulemaking.

Several documents pertaining to these contacts, proffered by EPA for the first time on appeal, were consulted by the court. *See Sierra Club*, 657 F.2d at 389–90 n.450; *cf. Citizens Ass'n*, 383 F. Supp. at 145 (benefits from public exposure). We have little doubt that without EDF's substantial contribution to this aspect of the case, our deliberations would have been less enriched and more time consuming. We note too that EDF's procedural challenges not only clarified how the new section 307(d) would operate, but apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings. *See* Stockman Memorandum For Heads of Executive Departments and Agencies 2 (June 13, 1981). Again, it was EDF's challenge that instigated the first major judicial inquiry into how section 307's rulemaking procedures would operate—a review that was necessary in order to resolve close questions of interpretation for future rulemaking under the Act.

C. *Conclusion*

In conclusion, we find that the express goals of the Clean Air Act—prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits—require that substantial contributions to significant litigation in furtherance of these goals be compensated. It was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking process not only involved highly technical and complex data, but controversial considerations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed.

The questions raised by Sierra Club and EDF needed to be resolved; yet no other party had a sufficient eco-

nomic interest at stake to represent them. Sierra Club and EDF were required to expend great efforts to perform their advocacy tasks well in matters of such technical complexity; their contribution to the court's prompt disposition of all issues raised in the case was substantial. As Congress recognized in enacting the citizen suit/cost provision of section 307, one cannot expect that contributions as substantial as those made by Sierra Club and EDF would be made by public interest groups without some form of compensation.

III. Instructions To The Litigants

We postpone consideration of the amount of compensation to be awarded in order to allow the parties to resume their abruptly ended negotiations. We commend to the parties the guidelines for attorneys' fees set out in *Environmental Defense Fund* v. *Environmmental Protection Agency*, Nos. 79–1811 & 79–1816 (D.C. Cir. Feb. 5, 1982); *Alabama Power Company* v. *Gorsuch*, No. 78–1006 (D.C. Cir. Feb. 5, 1982); *Anderson* v. *United States Department of the Treasury*, 648 F.2d 1 (D.C. Cir. 1979); *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980), and *Evans* v. *Sheraton Park Hotel*, 503 F.2d 117 (D.C. Cir. 1974). Finally, the same statutory language that allows us to make attorneys' fees awards in cases such as *Sierra Club*, limits our power to *judicial* proceedings. *Cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 62 (1980); *Parker* v. *Califano*, 561 F.2d 320, 327 (D.C. Cir. 1977) (interpretation of statutes not containing limitations to administrative or judicial proceedings). Sierra Club and EDF are, therefore, not entitled to an award of attorneys' fees for their participation in the administrative proceedings preceding their appeal.

The parties are expected to keep this court abreast of the progress of their negotiations by filing a report within three months of the date this opinion issues. If

at that time it is clear that settlement is impossible, this court will fix an award for attorneys' fees.[10]

So Ordered.

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[10] We have taken due notice of Judge Wilkey's dissent in Alabama Power Co. v. Gorsuch, No. 78–1006 (D.C. Cir. Feb. 5, 1982). In that dissent Judge Wilkey expresses disagreement with our interpretation of section 307(f)'s "appropriate" specification and suggests that we have, on the one hand, "conjured up" a number of standards to define that statutory term, and, on the other, "enacted" a single "nonfrivolous" standard. *Id.* at 19. Further, by interpreting "appropriate" as we have, Judge Wilkey appears to accuse us of judicially legislating. First, we believe our opinion makes clear that we have articulated *one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have "substantially contributed" to the goals of the Clean Air Act. In applying that standard to the *Sierra Club* litigation, we have enumerated several relevant factors, derived from the legislative history and prior cases, which Judge Wilkey mistakenly reads as establishing several different standards. We believe that it is equally clear that the standard we have applied amounts to much more than a "non-frivolous" standard. *See* pp. 11–13 *supra*. Finally, we do not feel free either to ignore Congress' mandate to determine the appropriateness of an award in each case, or to rewrite its legislation and substitute "prevailing" for "appropriate." Congress expressly used "appropriate" as the standard in section 307(f); it specifically gave to *courts* the authority to interpret that standard on a case-by-case basis (an entirely logical delegation, since courts would be in the best position to assess the contributions of the parties and the importance of each case). That authority is akin to that which courts are already exercising under a variety of statutory provisions. *See* n.8 *supra*. Clearly Congress knows the difference between "prevailing" and "appropriate." *Compare* the statutory provisions cited in n.7, *supra*, with the attorneys' fees provision used in FOIA, n.8 *supra*. Judge Wilkey appears reluctant to permit courts to flesh out section 307(f) as Congress required them to do; we, on the other hand, are reluctant to rewrite the legislation itself.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565

September Term, 1981

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

NATIONAL COAL ASSOCIATION, ET AL., INTERVENORS

AND CONSOLIDATED CASES

Filed—February 5, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of petitioner's (Sierra Club) motion for an award of attorneys' fees, and of its supplemental memorandum of points and authorities in support of that motion; of said petitioner's amended motion for attorneys' fees, the motion of petitioner Environmental Defense Fund for an award of attorneys' fees, the brief of respondent United States on the issue of attorneys' fees, and its response to petitioner Sierra Club's amended motion for attorneys' fees; the motion of respondent United States to bifurcate the issue of attorneys fees, petitioner Environmental Defense Fund's opposition to the motion to bifurcate, and petitioner's response to the brief of respondent United States and to its motion to bifurcate; of petitioner Environmental Defense Fund's amended motion for an award of attorneys' fees (with attachments), petitioner's reply to the response of respondent United States concerning the amended request for attorneys' fees, reply brief of respondent United States on the issue of attorneys' fees

for losing parties under 42 USC § 7607(f), petitioner Environmental Defense Fund's response to the reply brief of respondent; of petitioner Environmental Defense Fund's motion for leave to file an opposition in reply to respondent's memorandum on the proper size of an attorneys' fee award, time having expired, and of petitioner Sierra Club's motion for permission to file response to the memorandum of respondent United States on the proper size of an award of attorneys' fees to a losing litigant, out of time, and of said petitioner's lodged response, it is

ORDERED, by the Court, that the motions of petitioners Sierra Club and Environmental Defense Fund for leave to file responses to the memorandum of respondent United States on the proper size of any attorneys' fee award are granted and the Clerk is directed to file and to docket said responses, and it is

FURTHER ORDERED, by the Court, that attorneys' fees are awarded to petitioners Sierra Club and Environmental Defense Fund in such amounts as the parties may agree upon following further negotiations in accordance with the opinion of this Court filed herein this date. The parties are directed to keep this Court abreast of the progress of their negotiations by filing a report on or before May 5, 1982. If at that time it is clear that settlement is impossible, this Court will fix an award for attorneys' fees.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER
Clerk

Dated: February 5, 1982
Opinion *Per Curiam*

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, RESPONDENT

NATIONAL COAL ASSOCIATION
ALABAMA POWER ASSOCIATION, ET AL., INTERVENORS

And Consolidated Case Nos. 79–1719, 79–1867, 79–1874, 80–1187, 80–1201, 80–1213, and 80–1338

On Motion for Award of Attorneys' Fees

Decided July 16, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges.*

Opinion *Per Curiam.*

Opinion dissenting in part filed by *Senior Circuit Judge* ROBB.

PER CURIAM: In *Sierra Club* v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982) (hereinafter *Sierra Club II*), we held that an award of attorneys' fees to the Sierra Club and the Environmental Defense Fund ("EDF"), nonprevailing parties in *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981) (hereinafter *Sierra Club I*), was "appropriate" under section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f), because those parties had "substantially contributed" to the goals of the Clean Air Act

Amendments of 1977 by litigating "important, complex and novel" issues of statutory interpretation. *Sierra Club II*, 672 F.2d at 39. At the express suggestion of the government, we postponed consideration of the precise amount of compensation to be awarded in order to allow the parties to resume negotiations which had been abruptly ended by a shift in government policy resulting in routine oppostion to the grant of attorneys' fees to non-prevailing parties. *Id.* at 34 n.2. Unfortunately, a settlement has proven impossible. Accordingly, we must now resolve the matter. Taking into account the decisions of this court in *National Association of Concerned Veterans* v. *Secretary of Defense*, No. 81–1364 (D.C. Cir. Apr. 23, 1982) (petition for rehearing and rehearing *en banc* pending) (hereinafter *NACV); Environmental Defense Fund* v. *Environmental Protection Agency*, 672 F.2d 42 (D.C. Cir. 1982) (hereinafter *EDF* v. *EPA*); *Alabama Power Company* v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982); *Anderson* v. *United States Department of the Treasury*, 648 F.2d 1 (D.C. Cir. 1979); and, most important, *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) *(en banc)* (hereinafter *Copeland*), we find that Sierra Club is entitled to attorneys' fees amounting to $44,715 (plus $644.60 in expenses[1]) and that EDF is entitled to $45,874.80.

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[1] Sierra Club requested an award of $2,642.96 for expenses. In the exercise of our discretion, *see* 42 U.S.C. § 7607(f); *see also* Fed. R. App. P. 39, we do not allow expenses for filing fees ($139.42), brief printing ($658.94), and preparation of the appendix ($1,200). The $497.14 lawyer overhead costs, consisting of telephone calls and airfare documented prior to October 13, 1981, should be awarded, however, as out-of-pocket expenses not reimbursable in the counsel's *hourly* rate. Likewise, we allow $147.46 in similar expenses (telephone ($65.34) and copying ($82.12)) incurred since October 13, 1981; contrary to the government's assertion, they were properly documented. *See* Declaration of Joseph J. Brecher at 1 (May 5, 1982).

I. SIERRA CLUB'S REQUEST

Prior to the termination of fee negotiations in August, 1981, the government made a written offer of $32,265 to Sierra Club, which Sierra Club claims to have accepted before the government withdrew the offer under a revised policy of disputing all attorneys' fees claims by nonprevailing parties. Following our opinion in *Sierra Club II*, declaring that the Clean Air Act contemplated attorneys' fees awards in "appropriate" cases and holding *Sierra Club I* to be such a case, Sierra Club submitted a proposal for $60,656.75. This figure included Sierra Club's computation of the "lodestar"—"the number of hours reasonably expended multiplied by a reasonable hourly rate," *Copeland*, 641 F.2d at 891—on the basis of 479.5 hours at $110 per hour plus a 15% upward adjustment of the lodestar amount due to the government's alleged delaying tactics throughout the fee proceedings. *See* Sierra Club's Report To The Court And Second Amended Request For Attorneys' Fees at 2 (May 10, 1982) (hereinafter Sierra Club's Report). The government countered with an offer of $36,335, representing a reduction in hours and an hourly rate of $90 rather than $110 for time spent on the case-in-chief by the Sierra Club's attorney, Joseph Brecher.[2] *See id.* at Exhibit B. The government's figure, however, included the full 37 hours claimed for work on the attorneys' fees issue at $110 per hour. *Id.* The government predictably resisted any upward adjustment in the lodestar amount. *Id.* Sierra Club's final counteroffer, which was refused, was for 459.5 hours at $110 or $50,545.

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[2] Joseph Brecher is the only attorney for whom compensation is sought by Sierra Club. Sierra Club's original petition in May, 1981 had requested only $90 per hour for Brecher's time. This was revised in October to $110, after negotiations had broken off. Sierra Club's Report at Exhibit C.

Now Sierra Club requests $106,590 (and litigation costs of $2,642.96) based upon a lodestar of 484.5 hours (an additional 5 hours having been spent on fee negotiations) at $110 per hour, or $53,295, supplemented by a 50% upward adjustment for "exemplary" quality of representation and the public benefit conferred, and an additional 50% for delay in receipt of payment. The three main points of contention between Sierra Club and the government are: number of compensable hours, rate of pay for Brecher's time and the percentage of upward adjustment, if any.

A. *Number of Hours*

The government argues that Sierra Club's claim of 442.5 hours for work on the judicial aspect of its case-in-chief impermissibly includes non-litigation related activities as well as excessive hourly claims for certain litigation related activities. Specifically, approximately 67 hours for which Sierra Club seeks compensation were devoted to preparation of its administrative petition for reconsideration. The government correctly objects to these hours based upon our holding in *Sierra Club II*, which states: "the same statutory language that allows us to make attorneys' fees awards in cases such as *Sierra Club* [*I*], limits our power to judicial awards . . . . Sierra Club and EDF are, therefore, not entitled to an award of attorneys' fees for their participation in the administrative proceedings preceding their appeal." 672 F.2d at 42. Sierra Club's claim for these 67 hours is based upon a reading of that statement which lays too much emphasis upon the phrase "preceding their appeal," modifying "administrative proceedings." While it appears in this case that the petition for reconsideration to the Administrator was filed *after* an appeal from the decision on the final rule had been noticed, *Sierra Club II* was not intended to sanction attorneys' fees awards for administrative proceedings that happen to follow a

notice of appeal. Indeed, in our subsequent decision in *American Petroleum Institute* v. *Costle*, 665 F.2d 1176, 1191–92 (D.C. Cir. 1981), we made it clear that the filing of a petition for reconsideration was a statutory prerequisite to judicial review of procedural objections arising after the close of the comment period. Hence, we disallow the 67 hours spent on the petition for reconsideration, as well as 5.5 hours afterward devoted to research apparently connected therewith.[3]

Another 15.5 hours disputed by the government pertains to time Sierra Club claims to have spent preparing its petition for judicial review, a one-page document. The government concedes, United States' Response to Sierra Club's & Environmental Defense Fund's Status Reports and Amended Requests for Attorneys Fees at 9 (May 10, 1982) (hereinafter U.S. Response), that the "reasonable" number of hours spent on that document is "simply a matter of judgment." Although we note that a less experienced lawyer was allowed 42 hours for this purpose in *EDF* v. *EPA*, 672 F.2d at 50, we believe 10 hours is a reasonable amount here since the preparer was Brecher himself and his hourly rate a premium one. We additionally note the government did not object to 10 hours allocated by EDF for such a purpose in this proceeding.

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[3] These hours cover research on the following matters:

Date of Work	Description	Hours
1/23/80	Draft letter to Costle re: California SO_2 scrubbers	1.0
1/24/80	Submit letter re: 95% control	2.5
1/25/80	Research re: western scrubbers	.5
1/26/80	Draft letter to Costle re: S.C. Coal Project	1.5

Declaration Of Joseph J. Brecher In Support Of Sierra Club's Motion For An Award Of Attorneys Fees, Exhibit A at 4 (May 11, 1981). We have no indication that this research between January 23 and 26 was concerned exclusively with judicial matters. The petition for reconsideration was not denied until February, 1980.

Thus we disallow 78 of Brecher's hours for Sierra Club's case-in-chief. We also note, however, that Brecher documents 5 hours devoted to attorneys' fee negotiations since our decision in *Sierra Club II*, and we see no reason to limit the allowable time to the 37 hours previously expended as the government suggests. This makes the allowable total for Sierra Club 406.5 hours.

B. *Hourly Rate*

The government vigorously contests a rate of $110 per hour for Sierra Club's counsel. It suggests, citing *NACV*, that Sierra Club did not document its claim that $110 per hour was the "market rate" for Brecher's time by affidavits, from Brecher himself or from other counsel with comparable experience, showing billings for private clients at such a rate in comparable cases or recent court awards of fees to them in cases of comparable complexity. We do not think that affidavits of private attorneys like Brecher who represent primarily non-profit public interest organizational clients about their billing practices are necessary in all cases, especially where evidence of recent court awarded fees in comparable cases to comparably experienced lawyers exists to satisfy the demands of *Copeland* and *NACV* that court awarded fees be based on the prevailing market rate for the attorney's services.[4]

For several reasons, we believe that the $110 hourly rate is proper for Brecher's time. First, Joseph Brecher is a well known environmental lawyer, who is retained by the Sierra Club Legal Defense Fund to represent

[4] *NACV*, slip op. at 8, recognizes that "lawyers associated with public interest groups or single practitioners who specialize in Title VII or FOIA cases . . . may not have an established 'billing rate' that reflects how their own services have been valued in the market."

them in many litigation matters. He has continuously engaged in the practice of environmental law since 1970, representing primarily environmental organizations and Indian tribes before state and federal courts including the Supreme Court of the United States. He is the author of books and articles on environmental law and teaches that subject at Golden Gate Law School. Second, in our *Sierra Club II* opinion we alluded to the "technical complexity of the case" and its need for "extensive preparation" as well as its "importance to the national welfare." Third, we have a very recent precedent in our own court awarding $110 per hour fees expressly based upon prevailing market rates to a comparably experienced public interest lawyer in a comparably complex environmental case. In *EDF* v. *EPA*, 672 F.2d at 58, the court stated:

> In this case, given the importance of the post-decision negotiations, the high level of skill required (to maintain a litigation victory and yet accommodate to the legitimate needs and interests of numerous intervenors and a federal agency), the significant public interest value of the litigation, and the going "market value" for the services of a lawyer with rate claimed for Mr. Butler is perfectly reasonable.[5]

See also Palila v. *Hawaii Dept. of Land & Natural Resources*, 512 F. Supp. 1006 (D. Hawaii 1981) ($110 per hour fee award).

Finally, the government suggests we lower the hourly rate because Sierra Club did not prevail. We decline to do so for the same reasons we declined to lower the

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[5] In *EDF* v. *EPA*, 672 F.2d at 58, we noted that "EPA does not seriously contest the accuracy of rates cited by EDF insofar as 'market value' is concerned." Butler, *see EDF* v. *EPA*, 672 F.2d at 50, and Brecher have been in environmental practice for the same period of time, spearhearing the same kinds of litigation.

hours "reasonably expended" in *EDF* v. *EPA* on issues on which EDF did not prevail. *See EDF* v. *EPA*, 672 F.2d at 55. In so doing, we do not suggest such a reduction may never be proper. *See Copeland*, 641 F.2d at 893. Nonetheless, here the public service benefits of the litigation and the relative modesty of the fee for Brecher's gargantuan efforts on the case do not in our opinion warrant any reduction if the Clean Air Act's overriding purpose of encouraging constructive legal challenges, which would not otherwise be brought for lack of economic incentive, is to be served.

C. *Adjustments to the Lodestar*

Sierra's lodestar then is 406.5 hours at $110 per hour or $44,715. Sierra Club asks for a "substantial upward adjustment in the lodestar," *i.e.*, 100% based on the three factors identified in *Copeland* and *EDF* v. *EPA*: quality of representation; public benefit; and delay in receipt of payment. We decline, however, to allow any upward adjustment in this case for the following reasons:

We think it is proper to consider in this regard, as the government suggests, that Sierra Club did not prevail on any issue. The aim of "appropriate" attorneys' fees is to encourage parties without economic incentives to litigate important issues, but such efforts cannot be risk-free. Compensation for reasonable hours at market rates will generally be sufficient where the party has not prevailed.[6] *See Copeland*, 641 F.2d at 844 ("The

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[6] As we repeated recently in *EDF* v. *EPA*, 672 F.2d at 59 n.16 (citing *Copeland*, 641 F.2d at 892), "[t]he burden of justifying any deviation from the 'lodestar' rests on the party proposing the deviation." *See also EDF* v. *EPA*, 672 F.2d at 61:

> Finally, we must also consider the "results of the litigation." *Copeland*, 641 F.2d at 894. Although petitioners need not "prevail" in order to claim attorneys' fees under TSCA, we believe that "non-prevailing" is a factor that

'lodestar' itself generally compensates lawyers adequately for their time. An upward adjustment for quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client.") *EDF* v. *EPA*, 672 F.2d at 59–61, allowed a "modest" adjustment of 15–20% to reflect benefits to the public as well as the delay in receipt of payment. In that case, however, the claimants had prevailed on several of the issues in the suit. And although it is true that payments were delayed here, as well as in *EDF* v. *EPA*, through an initial termination in negotiations, on balance we do not consider the government's desire to test its new "prevailing party" fee policy in court so arbitrary as to court penalties. Sierra Club's counsel is being paid at $110 per hour, the current market rate, whereas his original request was for $90 per hour, thus according him some compensation for the delay. *See EDF* v. *EPA*, 672 F.2d at 60; *Copeland*, 641 F.2d at 893 n.23. As in *EDF* v. *EPA*, we allow no adjustment for the contingency factor since Sierra Club is being paid despite its non-prevailing status. And while the quality of representation by Sierra Club was exemplary, we believe the $110 rate, though perhaps lower than that billable to private clients, is still near the top level of court awarded fees and incorporates a presumption of skill and dedication of the type exhibited by legal craftsmen of Mr. Brecher's capabilities in this area of the law.

II. EDF's Request

EDF requests attorneys' fees of $98,359.50 reflecting $62,010 for services rendered by EDF's own attorneys,

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should militate against upward adjustments in the "lodestar." Here, EDF lost on one of three issues decided by the court in *EDF* v. *EPA*. The issue was hardly insignificant and, therefore, it cannot be ignored in our calculations.

and $36,349.50 for their retained counsel, Trilling & Kennedy, who worked on the attorneys' fees portion of the proceeding. The Trilling & Kennedy amounts reflect upward adjustments of 80% (for the period between February and May, 1982) and 100% (for the prior period). *See* Motion Of The Environmental Defense Fund To Amend And Supplement Its Application For Attorneys' Fees And Amended Application Therefore at 2 (May 17, 1982) (hereinafter Motion of the EDF).[7]

A. *Number of Hours*

EDF claims 398 hours for the work of four staff attorneys.[8] The government has no quarrel with this

[7] EDF originally accepted the government's offer of $30,125 in October, 1981 before the government's withdrawal of the offer. On March 29, 1982, EDF stated that a lodestar of $31,005 for EDF attorneys and $9,795.50 for Trilling & Kennedy would be satisfactory if "multiplied by an appropriate upward adjustment." Motion of the EDF at Exhibit 1.

[8]

	Butler	Rauch	Corcoran	Lennett
Preparation of Petition for Review (filed 8-10-79)		10		
Motion for Order Compelling EPA to Convene Proceedings for Reconsideration (filed 10-26-79)		21		
Reply to EPA's Opposition to Said Motion (filed 11-28-79)	3.5	30		
Preparation of Petition for Review of Order Denying Petition for Reconsideration (filed 2-19-80)		7		
Motion for Discovery and Memorandum in Support Thereof (filed 4-11-80)		15	24	
Reply to EPA's Opposition to Said Motion, Motion to Supplement the Record & Memorandum in Support Thereof (filed 5-14-80)	17.5	40	35	19
Reply to EPA's Response to Motion to Supplement the Record (filed 5-28-80)	10			
EDF Brief (filed 7-11-80)	40		25	

number. It does, however, dispute the additional 179 hours[9] claimed for Trilling & Kennedy, asserting that there was no need for both partners to represent EDF at fee negotiations and consultations.[10] In support the government cites *Copeland*, 641 F.2d at 891: "no compensation is due for non-productive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." We are satisfied, however, that such was not the case here. We have carefully surveyed the documentation by Trilling & Kennedy and have assured ourselves that their efforts were not duplicative. *See, e.g.*, Motion of the EDF, Declaration of Bingham Kennedy.

We are, however, troubled by a claim of close to $20,000 for time spent attempting to collect $31,005. Of course, the government must pay some price for an unsuccessful, even if *bona fide*, effort to block an award in *Sierra Club I*. But approximately half of the 179 hours was for time spent by Trilling & Kennedy during the three months following our decision in *Sierra Club*

EDF Reply Brief (filed 9-30-80) and Preparation for Oral Argument	50		30	14
Attorneys Fees Request				7
TOTAL	121	123	114	40

[9] Hours claimed are: Kennedy, 50.75; Trilling, 102.80; Doherty, 25.5 *See* Motion of the EDF, Declaration of Bingham Kennedy at 22–24; Memorandum In Support Of Amended Motion For Attorneys' Fees And In Reply To Respondent's Opposition To EDF's Request For An Award Of Attorneys' Fees at 39 (Nov. 13, 1981). An additional 6.05 hours were recently requested, which we allow in full. Reply of Petitioner EDF To May 27, 1982 U.S. Response at 6 (June 9, 1982).

[10] In *EDF* v. *EPA*, 672 F.2d at 62, the total hours awarded to Trilling & Kennedy were 84.8.

II. During that same period, Brecher spent five additional hours on Sierra Club's attorneys' fees claim. In retrospect, Sierra Club seems to have been more prudent, but we cannot say all but five hours of Trilling & Kennedy's time was unreasonably spent. However, after examining the time sheets and affidavits of Trilling & Kennedy, we feel that some reduction is in order. We conclude that only 40.38 hours were reasonably expended after February 5. (This represents a downward adjustment of approximately 50%.) With the adjustments noted on Trilling & Kennedy's May 18, 1982 erratum, the total hours recognized for Trilling & Kennedy are 147.93.

B. *Rates of Pay*

Although the government makes a general challenge to EDF's rate of pay for its attorneys on the basis that it does not accord with *NACV* standards of proof for "market value," we are not convinced. The EDF lawyers are billed per hour respectively at $110 for chief counsel William Butler, $75 for Robert Rauch, and $55 each for Larry Corcoran and David J. Lennett. Since all are employed by a public interest organization, they cannot be expected to submit client billings. Further, *EDF* v. *EPA* approved hourly rates for Butler and Lennett of the same amount claimed here. *See also Copeland*, 641 F.2d at 902 ($57 hourly rate for associates is reasonable). And as to the other two EDF attorneys (Rauch and Corcoran): Rauch has 7 years of experience in environmental work and is asking $75 per hour—this is certainly comparable to the rate applied to Ms. Warren who received $90 per hour in *EDF* v. *EPA* and who had 9 years of the same kind of experience—and Corcoran is of the same vintage as Mr. Lennett. The government interposes no specific objection to the rate of pay ($110 per hour) for Trilling & Kennedy's service and only a minor objection to the

rate of pay for EDF's attorneys.[11] Thus, EDF is entitled to an award of $45,874.80, calculated as follows:

	Rate/Hr.	Hrs.	Lodestar	
Butler	$110	121	$13,310.00	
Rauch	75	123	9,225.00	
Corcoran	55	114	6,270.00	
Lennett	55	40	2,200.00	
			$31,005.00	
Kennedy	$110	50.75	$ 5,582.50	
Trilling	110	102.80	11,308.00	
Doherty	55	25.50	1,402.50	
Adjustment to Trilling & Kennedy hours	110	(37.17)	(4,088.70)	
Additional hours spent to respond to U.S. Response[12]	110	6.05	665.50	
			$14,869.80	
				$45,874.80

[11] *See* Declaration of Jose R. Allen at 7 (May 27, 1982):

	Hours	Rate	Lodestar
William Butler	121	$100/hr ($110/hr)	$12,100 ($13,310)
Robert Rauch	123	$75/hr ($75/hr)	$ 9,225 ($ 9,225)
Larry Corcoran	114	$50/hr ($55/hr)	$ 5,700 ($ 6,270)
David Lennett	40	$40/hr ($55/hr)	$ 1,600 ($ 2,200)
Legal Intern*	75	$20 hr (0)	$ 1,500(0)
Totals			$30,125 ($31,005)

*EDF did not claim any hours for the work of a legal intern in its amended motion.

(EDF figures inside parentheses; government figures outside parentheses.)

[12] *See* n.9 *supra*.

For the reasons detailed above, we decline to allow any upward adjustment to that figure.

Judgment Accordingly

ROBB, *Senior Circuit Judge, dissenting in part:* I agree that Sierra Club and the Environmental Defense Fund are entitled to some attorneys' fees despite their lack of success on the merits. I also agree with the court's calculation of hours reasonably expended and hourly rates. However, when a litigant loses on every issue in the case, as here, I think the "appropriate" standard under section 307(f) of the Clean Air Act calls for some reduction in the lodestar amount. Accordingly, I dissent from the portion of the majority opinion discussing adjustments to the lodestar.

In *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880 (1980) (*en banc*), this court stated that adjustments to the lodestar "may be upward or downward," noting "[a]n upward adjustment for quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client." *Id.* at 404, 641 F.2d at 894. Considering result as part of the quality assessment, it is hard to imagine a better case for downward adjustment than this one. If counsel were private practitioners their clients might well complain that they could have lost the case for less money.

This argument applies with special force to statutes such as section 307(f), which permit awards of attorneys' fees to non-prevailing parties where "appropriate". One purpose of awarding fees to non-prevailing parties is to shift the costs of a private lawsuit to the "taxpaying public, which receives the benefits of [the] litigation." *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973), *cited in* H. Rep. No. 95–294, 95th Cong., 1st Sess. 337. Reducing

the award in this case would recognize the diminished value of a losing lawsuit to the public.

This court has refused to reduce the lodestar to account for lack of success when a party lost on only one of three issues. *See Environmental Defense Fund v. EPA*, ___ U.S. App. D.C. ___, 672 F.2d 42 (1982). Here, however, the petitioners lost on every issue; they batted zero. If downward adjustments to the lodestar are ever to be made as *Copeland v. Marshall* suggests, this is an "appropriate" place to start.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1565
September Term, 1981

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, Respondent

NATIONAL COAL ASSOCIATION, ALABAMA POWER ASSOCIATION, ET AL., INTERVENORS

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and consolidated case Nos. 79-1719, 79-1867, 79-1874, 80-1187, 80-1201, 80-1213, and 80-1338.

Filed—July 16, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges*

ORDER

It is ORDERED by the Court, *sua sponte*, that the opinion for the Court filed in the above entitled case be, and it hereby is, amended as follows:

Page 2, line 23—delete "(petition for rehearing and rehearing *en banc* pending)" and insert in lieu thereof "(as amended July 15, 1982)".

PER CURIAM
FOR THE COURT
GEORGE A. FISHER
Clerk

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565
September Term, 1981
SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, RESPONDENT

And Consolidated Case Nos. 79–1719, 79–1867, 79–1874, 80–1187, 80–1201, 80–1213 and 80–1338

Filed—July 16, 1982

Before: ROBB, *Senior Circuit Judge*, WALD and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of the parties' reports to the Court on the status of settlement negotiations relating to attorneys' fees, of petitioners' amended requests for attorneys' fees, of respondent's statements in response to petitioners' status reports and to their amended requests for attorneys' fees, and of the replies thereto, and for the reasons set forth in the Opinions for the Court filed herein on February 5, 1982 and on this date, respectively, it is

ORDERED, by the Court, that petitioner Sierra Club is entitled to attorneys' fees amounting to $44,715. (plus $644.60 in expenses) and that petitioner Environ-

mental Defense Fund is entitled to attorneys' fees in the sum of $45,874.80, all payable by respondent.

PER CURIAM
FOR THE COURT
GEORGE A. FISHER
Clerk

Date: July 16, 1982
Opinion Per Curiam
Opinion dissenting in part filed by Senior Circuit Judge Robb.

APPENDIX D

Parties to the Petitions for Review in the court below, on the merits of those petitions, and who did not participate on the issue of attorneys' fees, are:

Alabama Power Company; Arizona Public Service Company; Appalachian Power Company; Arkansas-Missouri Power Company; Arkansas Power & Light Company; Baltimore Gas and Electric Company; Boston Edison Company; Carolina Power & Light Company; Central Hudson Gas & Electric Corporation; Central Illinois Light Company; Central Illinois Public Service Company; Central Maine Power Company; Central Power & Light Company; Central & South West Corporation; Cincinnati Gas & Electric Company; Columbus and Southern Ohio Electric Company; Commonwealth Edison Company; Connecticut Light and Power Company; Consolidated Edison Company of New York, Inc.; Consumers Power Company; Dayton Power and Light Company; Delmarva Power and Light Company; Detroit Edison Company; Duke Power Company; Edison Electric Institute; Florida Power Corporation; Florida Power & Light Company; General Public Utilities Corporation; Georgia Power Company; Gulf Power Company; Gulf States Utilities Company; Hartford Electric Light Company; Holyoke Water Power Company; Houston Lighting & Power Company; Illinois Power Company; Indiana & Michigan Electric Company; Indianapolis Power & Light Company; Iowa-Illinois Gas and Electric Company; Iowa Power and Light Company; Iowa Public Service Company; Jersey Central Power & Light Company; Kansas City Power & Light Company; Kentucky Power Company; Kentucky Utilities Company; Louisiana Power & Light Company; Madison Gas and Electric Company; Metropolitan Edison Company; Middle South Utilities, Inc.; Minnesota Power & Light; Mississippi Power Company; Mississippi Power & Light Company; Missouri Associa-

tion of Municipal Utilities; Monongahela Power Company; National Coal Association; National Rural Electric Cooperative Association; Nevada Power Company; New England Power Company; New Orleans Public Service, Inc.; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Northeast Utilities Service Company; Northern Indiana Public Service Co.; Northern States Power Company; Ohio Edison Company; Ohio Power Company; Ohio Valley Electric Corporation; Oklahoma Gas & Electric Company; Pacific Power & Light Company; Pennsylvania Electric Company; Pennsylvania Power Company; Pennsylvania Power & Light Company; Portland General Electric Company; Potomac Edison Company; Potomac Electric Power Company; Public Service Company of Indiana, Inc.; Public Service Company of Oklahoma; Public Service Electric & Gas Company; Rochester Gas & Electric Corporation; Salt River Project; San Diego Gas & Electric Company; Southern California Edison Company; Southwestern Electric Power Company; State of California Air Resources Board; Tampa Electric Company; Texas Utilities Generating Company; Toledo Electric Power Company; Tucson Electric Power Company; Union Electric Company; Utah Power & Light Company; Virginia Electric & Power Company; Western Massachusetts Electric Company; West Penn Power Company; West Texas Utilities Company; Wisconsin Electric Power Company; Wisconsin Power & Light Company; and Wisconsin Public Service Corporation.

No. 82-342

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 11, 1982
CERTIORARI GRANTED OCTOBER 18, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-242

ANNE M. GORSUCH, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

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UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

GENERAL DOCKET

79-1565

Date	Filings—Proceedings
(D)6-1-79	4—Petitioner's petition for review of an order of the EPA
(D)6-1-79	Certified copy of petition for review was mailed to EPA
(T)6-29-79	4—Motion of Alabama Power Company, et al. for leave to intervene (m-29)
(T)6-29-79	4—Motion of National Coal Association for leave to intervene (m-29)
(E)7-10-79	Clerk's order granting the motions of Alabama Power Co., et al. and National Coal Association for leave to intervene. Intervenor's briefs are extended until 15 days after the party they support files its brief.
(G)7-16-79	Certified Index to Record (n-5)
(E)8-17-79	Clerk's order that this case is consolidated with 79-1719 and the motion to establish a briefing schedule is denied without prejudice to resubmission at such time as the time for filing of petitions for review of the order under review expires
(C)8-17-79	4—Respondent's motion to consolidate Nos. 79-1565, 79-1719, 79-1867, 79-1874; to adopt the certified index in 79-1565 as the index in 79-1719, 79-1867, 79-1874; and to stay further proceedings pending completition [*sic*] of administrative action (m-17)
(E)9-10-79	Clerk's order granting respondent's motion to consolidate Nos. 79-1565, 79-1719, 79-1867 and 79-1874 and the certified index filed in 79-1565 shall be deemed filed in the consolidated cases. Petitioners' briefs is extended until 40 days after respondent's disposition of the pending petitions for reconsideration of the rule at issue. Counsel for respondent shall advise the Clerk of the status of the petition at 60 day intervals hereafter

Date	Filings—Proceedings
(T)10-11-79	Clerk's order granting intervention in Nos. 79-1867 and 79-1874
(D)10-26-79	4—Motion of Sierra Club/EDF for order compelling EPA to convene proceedings for reconsideration (m-26)
(D)11-5-79	4—Respondent's opposition to Sierra Club/EDF for order compelling EPA to convene proceedings for reconsideration (m-5)
(C)11-19-79	4—EPA's status report per 9/10/79 order (m-9)
(T)11-29-79	4—Petitioner's motion for leave to file out of time reply to EPA's opposition to motion for order compelling EPA to convene proceedings for reconsideration (m-29)
(C)12-4-79	Clerk's order granting petitioner's (environmental) motion for leave to file reply to EPA's opposition to motion for order compelling and Clerk is directed to file petitioner's lodged reply
(C)12-4-79	4—Petitioner's (environmental) reply to respondent's opposition to motion for order compelling EPA to convene proceedings for reconsideration (m-29)
(E)12-7-79	Per Curiam order denying the motion for an order compelling the EPA to convene proceedings for reconsideration and, sua sponte, that respondent dispose of the pending petitions for reconsideration on or before Jan. 31st. and that the order filed Sept. 10th, 1979 is modified to the extent that a status report be filed Dec. 19th, 1979 and further reports at 20 days intervals; McGowan (who did not participate), Tamm and Wald, CJ's
(D)12-18-79	4—Respondent's status report (m-18)
(D)1-7-80	4—Respondent's status report (m-4)
(D)1-25-80	4—Respondent's status report (m-24)
(D)2-11-80	4—Respondent's status report
(T)2-14-80	4—Petitioner's motion to establish expedited briefing schedule (m-14)
(D)2-22-80	4—Respondent's response to petitioner's motion to establish expedited briefing
(D)2-25-80	4—Petitioner's (State of CA. Air Resources Board in 79-1867) opposition to petitioner's motion to establish expedited briefing schedule (m-22)
(E)2-29-80	Clerk's order granting petitioner's motion to consolidate Nos. 80-1187, 80-1201 & 80-1213 with 79-1565, et al.

Date	Filings—Proceedings
(C)2-29-80	4—Petitioners' motion to extend time to file reply to responses to motion to establish briefing schedule (m-29)
(T)3-7-80	Clerk's order granting petitioners' motion to extend time to file reply to response to motion to establish briefing schedule to March 3, 1980
(T)3-7-80	4—Petitioners' reply to oppositions to motion to establish expedited briefing schedule (m-3)
(D)3-7-80	4—Respondent's motion for leave to file reply to response on briefing schedule (m-7)
(E)4-1-80	Clerk's order, sua sponte, that Nos. 79-1565, et al. and 80-1338 are consolidated
(E)4-1-80	Per Curiam order granting the motion to expedite and the following schedule shall apply May 21st—petitioners' briefs, June 23rd—respondent's brief, July 9th—intervenor's briefs, July 23rd—reply briefs. Intervenor's briefs should not repeat argument set forth by respondents. The parties are granted leave to proceed under Rule 30(c). The cases will be heard at oral argument during the September, 1980 sitting period of the Court; CJ Wright, Tamm (who did not participate) and Robinson, CJ's
(C)4-10-80	4—Respondents' motion for leave to file supplemental certified index (m-7)
(E)4-18-80	Clerk's order granting respondent's motion to file supplemental certified index
(E)4-18-80	Supplemental Certified Index (n-10)
(D)5-8-80	4—EPA's motion for leave to file supplemental certified index to record (m-8)
(E)5-16-80	Clerk's order granting respondent's motion for leave to file supplemental certified
(E)5-16-80	Supplemental Certified Index to Record (n)
(E)5-16-80	Order per CJ Wright that in the event of a denial of the motion for leave to take depositions or serve interrogatories the following briefing schedule shall apply: petitioners briefs—10 days after denial of motion, respondent's brief—33 days after petitioners briefs, Intervenors' briefs—16 days after respondent's brief, reply briefs—14 days after intervenors' briefs. If the motions are granted, new motions to govern the briefing should be submitted within 10 days of the order granting the motion.
(C)6-3-80	Order per CJ Wright denying EDF's motion for clarification of order of 5/16/80

Date	Filings—Proceedings
(D)6-3-80	4—Respondent's motion for leave to file supplemental certified index to record (m-3)
(C)6-9-80	Clerk's order granting respondent's motion for leave to file supplemental certified index
(C)6-9-80	Supplemental Certified Index to Record (n)
(C)6-16-80	Per Curiam order that the documents listed in EDF's motion to supplement the record lodged with the Court pending determination whether they should be included in the record; Copies of the documents shall be included in a separate volume of the joint appendix and cited in the briefs as Appendix to Lodged Documents (ALD); The parties in their briefs should address the question of the relevance of the documents and also the issues raised by them; McGowan (who did not participate); Mikva and Edwards, CJs
(C)6-16-80	Per Curiam order that petitioner's (EDF) motion for leave to obtain discovery is referred to the division of this Court to be drawn to hear this case on the merits; The parties in their briefs should address the petitioner's entitlement to the information requested and petitioner's need for the information requested in order to prosecute its case fully; respondent shall submit to the court within 5 days of the date of this order an affidavit(s) providing information about the following meetings, identified here by date with reference to the petitioner's motion: March 14, 1979; April 23, 1979; April 27, 1979; April 30, 1979; May 2, 1979; The affidavit shall identify the participants in the foregoing meetings, and shall describe as fully and accurately as possible how the meetings came to be held and the approximate length of each; Briefs in these cases shall be submitted pursuant to the following schedule: Petitioners' brief(s)—10 days after filing of respondent's affidavit Respondent's brief—30 days after filing of petitioners' brief Intervenors' brief(s)—15 days after filing of respondent's brief Reply brief(s)—12 days after filing of intervenors' brief(s) McGowan (who did not participate); Mikva & Edwards, CJs

Date	Filings—Proceedings
(D)6-20-80	4—Respondent's motion to extend time to file affidavits to 6-24-80 (m-20)
(D)6-23-80	4—Petitioner's motion to extend time to file brief and for leave to file brief exceeding page limitations (m-20)
(E)6-25-80	Clerk's order granting respondent's motion to extend time to file affidavits to June 24, 1980
(D)6-25-80	1—Affidavits pursuant to order of 6-16-80
(C)6-27-80	Clerk's order granting petitioner's motion for leave to file brief not in excess of 65 pages by standard typographical print or 85 pages by any other method and the briefing schedule set forth in this Court's order of 6/16/80 is amended so that the following schedule shall now apply: July 11, 1980—Petitioner's brief; August 11, 1980—Respondent's brief; August 26, 1980—Intervenors' brief(s); September 8, 1980—Reply briefs, if any; No further extensions of time for filing briefs shall be allowed
(G)7-14-80	15—Petitioner's brief (m-9)
(D)7-23-80	4—Respondents' motion to extend time to file brief to 9-2-80 (m-23)
(T)7-28-80	4—Petitioner's response to respondents' motion to extend time to file brief (m-24)
(C)08-04-80	Clerk's order granting respondents' motion to extend time to file brief to 9/2/80; No further extension of time will be granted except for extraordinary cause shown
(T)08-04-80	4—Respondents' motion for leave to file motion to exceed page limitations on brief (m-4)
(B)08-14-80	Clerk's order directing that Clerk to file respondents' motion for leave to exceed page limitation in brief and respondent is granted leave to file a brief not in excess of 150 pages
(B)08-14-80	4—Respondent's motion for leave to exceed page limitation on brief (m-4)—filed per above order
(B)08-14-80	Clerk's order, sua sponte, that this Court's order of 8-4-80 be, and the same here by is, vacated and that the following briefing schedule, with no further extensions, shall apply: Respondent's brief—9-2-80; Intervenor's brief(s)—9-17-80; Reply briefs—9-30-80
(C)08-25-80	4—Respondents' motion for leave to file affidavit (m-21)

Date	Filings—Proceedings
(C)09-02-80	4—Respondents' motion for leave to file motion to file brief exceeding page limitations (m-2)
(B)09-05-80	Clerk's order granting respondents' motion for leave to file affidavit
(B)09-05-80	4—Respondents' affidavit (m-21)
(T)09-09-80	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appalachian Power Co., et al—20 minutes; Sierra Club and EDF—30 minutes (2 counsel may argue); EPA (and supporting intervenor National Coal Association)—45 minutes (2 counsel may argue); TOTAL TIME—1 hour 35 minutes
(T)09-09-80	Clerk's order directing Clerk to file respondents' second motion for leave to extend page limitations and granting motion
(T)09-09-80	4—Respondents' second motion for leave to extend page limitations—granted
(T)09-09-80	15—Respondents' brief (m-2)
(T)09-10-80	4—Letter from counsel for respondents advising of additional authorities pursuant to Rule 28(j), FRAP (m-8)
(T)09-12-80	Clerk's order, sua sponte, that this Court's order of September 9, 1980 is amended by deleting therefrom the instruction that two counsel may argue on behalf of the Environmental Protection Agency and supporting intervenor National Coal Association; leave is granted for two counsel to argue on behalf of the Environmental Protection Agency and one counsel on behalf of the National Coal Association.
(T)09-12-80	7—EDF's appendix of lodged documents—lodged per order dated 6/16/80 (m-12)
(T)09-17-80	15—Intervenor's (National Coal Association) brief (m-17)
(C)09-18-80	7—Joint appendix (Vol. I) (m-17)
(B)09-22-80	Argued before Robb, Wald* and Ginsburg, CJ's
(T)09-23-80	4—Response of Appalachian Power Co., et al. to motion of Environmental Defense Fund for extension of briefing schedule (m-23)
(B)09-25-80	Per Curiam order that petitioner is granted leave to file a reply brief not in excess of 40 pages of standard typographic printing or 50 pages by any other process; and that the motion for enlargement of time to file reply brief is denied; Robb, Wald, and Ginsburg, CJ's (in Nos. 79-1874 and 80-1213 only)

Date	Filings—Proceedings
(T)09-25-80	4—Petitioner's motion to extend time to file reply brief to October 14, 1980 (m-24)
(T)09-25-80	Letter from Clerk to counsel requesting that certain material be submitted
(B)10-06-80	Clerk's order denying the motion of Sierra Club, et al. to extend time to file reply brief to
(T)10-08-80	7—Joint Appendix (Volumes II through XI) (m-8)
(T)10-09-80	15—Petitioner's reply brief (m-30)
(T)10-14-80	7—Corrected joint appendix volume XI (m-14)
(T)10-21-80	15—Respondents' brief (m-21)
(C)10-22-80	7—Joint Appendix (Vol XII) (m-22)
(C)10-24-80	15—Intervenor's (National Coal Assoc.) brief (m-24)
(C)11-05-80	15—Petitioner's brief (m-31)
(C)11-05-80	15—Petitioner's reply brief (m-31)
(T)01-16-81	4—Letter from counsel for respondents supplementing their 28(j) letter of September 10, 1980 (m-15)
(T)01-22-81	Per Curiam order that EPA shall submit to the Court a brief memorandum within 10 days from the issuance of this order which responds to petitioners' argument about the Bruce Mansfield data; petitioners Appalachian Power Co., et al., are granted leave to reply with a brief memorandum within 5 days thereafter; Robb, Wald and Ginsburg, CJs
(T)01-26-81	4—Letter from counsel for EDF advising of additional authorities pursuant to Rule 28(j), FRAP (m-23)
(T)02-03-81	4—EPA's supplemental memorandum (m-3) (OK RB)
(C)02-17-81	4—Response of Appalachian Power Co., et al. to EPA's supplemental memorandum (m-14)
(H)4-29-81	Opinion for the Court filed by Circuit Judge Wald
(H)4-29-81	Judgment affirming the regulations of the EPA, for the reasons set forth in the Opinion for the Court filed herein this date.
(T)05-13-81	4—Petitioner's motion for an award of attorneys fees (m-12)
(T)05-21-81	4—Respondent's motion to extend time to file response to motion for an award of attorneys fees to June 5, 1981 (m-21)
(V)05-26-81	4—EDF's motion for an award of attorneys fees (m-26)
(B)05-29-81	Clerk's order granting respondent's motion [*sic*] to extend time to file response to motion for an award of attorneys fees to June 5, 1981

Date	Filings—Proceedings
(R)06-01-81	Per Curiam order sua sponte, that the Opinion for the Court filed by Circuit Judge Wald in this case on April 29, 1981 is hereby amended (See Order)
(V)06-05-81	4—Respondent's unopposed motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 3, 1981 (m-4)
(B)06-18-81	Clerk's order granting respondent's motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 3, 1981
(V)07-06-81	4—EPA's unopposed motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 21, 1981 (m-6)
(B)07-09-81	Clerk's order that EPA's motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 21, 1981 is granted
(V)07-21-81	4—EPA's motion to extend time to respond to Sierra Club's and EDF's motions for attorneys fees to August 20, 1981 (m-21)
(B)08-03-81	Clerk's order granting EPA's motion to extend time to respond to Sierra Club's and EDF's motions for attorneys fees to August 20, 1981
(V)08-26-81	4—Respondent's motion for leave to file response to Sierra Club's and EDF's motion for awards of attorneys fees, out of time (m-26)
(V)09-16-81	4—Petitioner's opposition to respondent's motion for leave to file response to Sierra Club's and EDF's motion for award of attorneys fees, out of time (m-11)
(V)09-22-81	4—Petitioner's (EDF) motion for leave to respond to respondent's motions to file out of time and for enlargement of time to respond to motions for award of attorneys' fees, out of time (m-22)
(B)10-05-81	Per Curiam order, sua sponte, that the Sierra Club is granted leave to amend its petition for attorneys fees and to file said amended petition on or before 10-13-81; and sua sponte, that parties herein are granted an extension of time to and including 10-20-81, within which to file a response to the amended petition for attorneys' fees; Robb, Wald, and Ginsburg, CJ's vacated per 10-13-81 order.
(V)10-08-81	Letter dated 10/05/81 from counsel for respondent to withdraw appearance of Nancy Long, Atty-at-Law
(V)10-08-81	4—Brief of the United States on the issue of attorneys' fees for losing parties under 42 U.S.C. 7607(f) (m-5)

Date	Filings—Proceedings
(G)10-13-81	Per Curiam order sua sponte, that petitioners Sierra Club and EDF are granted leave to amend their petitions for attorneys' fees and to file said amended petitions on or before October 19, 1981, and that respondent is granted an extension of time to and including October 26, 1981, within which to respond to the amended petitions for attorneys' fees; Robb, Wald and Ginsburg; CJs
(G)10-13-81	Per Curiam order sua sponte, that the order entered herein on October 5, 1981, concerning the motions for attorneys' fees, be and it is hereby vacated; Robb, Wald, and Ginsburg, CJs
(G)10-13-81	4—Respondent's motion to extend time to respond to Sierra Club's and EDF's motions for awards of attorneys fees (m-26) filed per above order
(G)10-13-81	4—Petitioner's (EDF) response to respondent's motions for leave to file out of time motion for enlargement of time to respond to motions for award of attorneys' fees (m-22) filed per above order
(G)10-13-81	4—Respondent's reply to oppositions of Sierra Club and EDF to motions for leave to file out of time and enlargement of time to respond to motions for award of attorneys' fees (m-1) filed per above order
(V)10-13-81	Letter dated 10/13/81 from counsel for EDF for appearance of Bingham Kennedy and Barry J. Trilling, Esq.
(V)10-13-81	4—EDF's consent motion to extend time to file reply memorandum to brief of the United States on the issue of attorneys' fees until 11/06/81 (m-13)
(V)10-15-81	4—Petitioner's amended request for attorneys' fees (m-13)
(V)10-22-81	4—EDF's consent motion to extend time to amend petition for attorneys' fees until 11/06/81 (m-21)
(B)11-02-81	4—Response for the United States to the Sierra Club's amended request for attorneys' fees (m-28)

Date	Filings—Proceedings
(B)11-03-81	Per Curiam order that petitioner's (EDF) motion for enlargement of time within which to amend its motion for attorney's fees is granted and petitioners (EDF and Sierra Club) are granted an extension of time, to and including 11-6-81, within which to file their amended petitions for attorney's fees; and that respondents are directed to file a response specifically directed to such amended petitions for attorney's fees, on or before 11-20-81. No further extensions of time will be permitted for either side, absent showing of extraordinary cause; Robb, Wald and Ginsburg, CJ's
(V)11-03-81	4—EDF's consent motion to extend time to file and serve documents to 11/13/81 (m-3)
**(T)11-02-81	4—Respondent's motion to bifurcate the issue of attorneys' fees (m-28)
(T)11-05-81	4—EDF's opposition to motion to bifurcate the issue of attorneys' fees (m-5)
(V)11-09-81	4—Petitioner's response to brief for United States on the issue of attorneys' fees and motion to bifurcate decision (m-5)
(V)11-16-81	4—Sierra Club's response to the United States to amend request for attorneys' fees (m-12)
(B)11-20-81	Clerk's order granting EDF's motion for enlargement of time to file and serve documents to 11-13-81
(B)11-20-81	4—EDF's amended motion for an award of attorneys' fees (m-13)—filed per above order
(G)11-20-81	4—Motion of US for leave to file motion to extend time to file brief on attorneys' fees (m-20)
(C)12-07-81	Per Curiam that granting respondent's motion for leave to file motion to extend time to file brief on attorneys' fees and costs and the Clerk shall file and docket respondent's motion for extension of time and respondent's motion for extension of time within which to file its brief is granted to and including December 7, 1981; Robb, Wald & Ginsburg, CJs
(C)12-07-81	4—Respondent's motion to extend time to file brief on attorneys' fees—granted
(C)12-07-81	4—Reply brief for the United States on the issue of attorneys' fees for losing parties under 42 USC 7607(F) (m-4)
(V)12-10-81	4—Sierra Club's opposition to motion to set date for filing brief on size of attorney fee award (m-7)

Date	Filings—Proceedings
(V)12-10-81	4—EDF's response to December 4, 1981 reply brief of respondent (m-4)
(V)12-14-81	4—EDF's opposition to respondent's motion to set date for the filing of the government's brief on the size of any attorneys' fee award (m-11)
(C)01-08-82	4—EDF's motion for leave to file opposition in reply to respondent's memorandum on the proper size of attorneys' fee award, time having expired (m-8)
(V)01-18-82	4—Petitioner's motion for permission to file out of time response to memorandum for the US on the proper size of an attorney fee award to a losing litigant (m-12)
(R)2-5-82	Opinion Per Curiam and Order granting leave to file documents and directing award of fees
(C)05-05-82	4—Report of petitioner EDF concerning settlement negotiations (m-5)
(C)05-07-82	4—EPA's status report (m-5)
(C)05-10-82	4—Sierra Club's report to the Court and second amended request for attorneys' fees (m-5)
(C)05-17-82	4—Motion of EDF to amend and supplement its application for attorneys' fees and amended application therefore (m-17)
(V)05-20-82	Per Curiam order, sua sponte, that respondent may file, at her option, a single response to the various pending requests by petitioners for attorneys' fees and expenses; and sua sponte, that respondent's response or responses shall be filed on or before May 27, 1982. Extensions of time will only be granted on showing of extraordinary cause; Robb, Wald and Ginsburg, CJs
(B)05-27-82	4—Respondent's response to Sierra Club's and EDF's status reports and amended requests for attorneys fees (m-27)
(C)06-07-82	4—United States' response to Sierra Club's and EDF's status reports and amended requests for attorneys fees (m-27) CORRECTED RESPONSE
(C)06-07-82	4—Sierra Club's reply to United States' response to amended fees request (m-4)
(C)06-09-82	4—Petitioner's reply to respondent's response to amended fees request (m-9)
(V)06-22-82	Per Curiam order that petitioner's motion to amend and supplement its application for attorneys' fees is granted; Wald and Ginsburg, CJs and SCJ Robb
(S)07-16-82	Opinion per curiam
(S)07-16-82	Fees are awarded in accordance with the opinion filed

Date	Filings—Proceedings
(S)07-16-82	Standard order on mandate
(S)07-16-82	Per Curiam order that the opinion is amended
(C)07-20-82	4—Letter from counsel for EPA advising of additional authorities pursuant to FRAP 28(j) (m-20)
(B)07-22-82	4—United States' motion for stay of mandate (m-22)
(V)08-13-82	Per Curiam order that respondent's motion for stay of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of thirty (30) days from the date of this order; SCJ Robb, Wald and Ginsburg, CJs
(C)08-18-82	Notice from Clerk, SC that petition for writ of certiorari was filed in SC No. 82-242 on Aug. 11, 1982
(T)10-19-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-242 on 10-18-82

EXCERPTS FROM CALENDAR OF DAVID G. HAWKINS, ASSISTANT ADMINISTRATOR, EPA, for April 30, 1979 and May 1, 1979*

Monday, April 30, 1979:

10 a.m.:	WHITE HOUSE MEETING ON NSPS

*****

2:30 p.m.:	MESSRS. FRED KAHN, WALT BARBER, FRANK PRINCIOTTA & MS. BANKOFF RE: DRY SCRUBBING 200 OEOB

Tuesday, May 1, 1979:

10:00 a.m.:	MESSRS. PHIL CUMMINGS WALT BARBER RE: NSPS 4204 DIRKSEN

*Included in Environmental Defense Fund's Appendix of Lodged Documents, filed September 5, 1980, at A-5

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 11, 1980

No. 79-1565
79-1874

SIERRA CLUB, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

AND CONSOLIDATED CASES

ENVIRONMENTAL DEFENSE FUND MOTION FOR LEAVE TO OBTAIN DISCOVERY FROM RESPONDENT EPA

Pursuant to Federal Rule of Appellate Procedure 27(a) and on the grounds set forth in the attached memorandum, the Environmental Defense Fund (EDF) moves for leave to take depositions of the following key respondent (EPA) officials or, in the alternative, for leave to serve interrogatories on these officials:

Douglas M. Costle, Administrator
Barbara Blum, Deputy Administrator
David Hawkins, Assistant Administrator for Air and Waste Management
Charles Warren, Regional Administrator for Region II, formerly Director, Office of Legislation
Walter Barber, Director, Office of Air Quality Planning and Standards

The inquiries will be limited to (1) the identity of participants in post-comment period conversations and meetings with private parties, members of Congress, and senior officials of other government agencies and offices; and (2) simple narrative descriptions of the conversations and meetings, particularly by non-EPA participants.

The requested discovery is necessary to inform the court of the substance of post public comment period communications with EPA by interested parties opposed to the new source performance standards (NSPS) alternatives originally favored by the EPA. These communications included calls, letters and meetings. Subsequent to these *ex parte* communications, NSPS were promulgated which are less stringent than the three alternatives favored within EPA shortly after close of the public comment period. In its June 29, 1979, petition to EPA for reconsideration of the NSPS, EDF requested that a detailed summary of each meeting be prepared and included in the docket as part of the record for review. The EPA Decision in Response to Petitions for Reconsideration states that "Agency officials wrote memoranda of all significant oral communications between Agency officials and persons outside the executive branch." 45 Fed. Reg. 8210, 8214. This is not correct. Furthermore, it is not for EPA to determine which *ex parte* communications after close of the public comment period are "significant" and, therefore, subject to disclosure to the public and to this court. EPA has not prepared summaries of meetings held on March 14, 1979 (participants: EPA, DOI, CEQ, DOE, White House), and March 28, 1979 (participants: Eastern coal state Senators, White House, Costle, numerous other parties). The EPA meeting summaries which do exist are not adequate. Attachments* A, B, C and D to this motion are EPA summaries of meeting held April 23, April 27, April 30 and May 2, 1979. It is apparent that the sketchy EPA summaries do not disclose the comments of the non-EPA participants. (See especially Attachment D, a forty-nine word summary of a meeting with at least twelve participants.)

The information sought by this discovery will aid the court in its determination of the validity of the challenged standards. The inquiries will be limited to factual accounts of what was communicated, particularly by the non-EPA

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*Each Attachment is part of the Record for Review: Attachment A—IV-E-13; Attachment B—IV-E-15; Attachment C—Attached to back of IV-E-24; Attachment D—IV-E-24.

participants, and will avoid prying into the mental processes of EPA decision-makers.

Respectfully requested,

/s/ ROBERT J. RAUCH
Staff Attorney

/s/ LARRY MARTIN CORCORAN
Staff Attorney

ATTACHMENT C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

Office of
Air, Noise, and Radiation

April 30, 1979

SUBJECT: Meeting on Coal-Fired Power Plants on April 30, 1979
Attendees: Fred Kahn, George Eads, Si Lazarus, Walt Barber, Al Alm, Frank Princiotta, Barbara Bankoff, Bob Statnick and other White House staff

FROM: David G. Hawkins, Assistant Administrator for Air, Noise, and Radiation (ANR-443)

TO: The Files

The purpose of this meeting was to provide a technical briefing on the so-called dry scrubbing technology, to describe the state-of-the-art, future expected performance levels, utility orders, etc.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1565

SIERRA CLUB, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
AND CONSOLIDATED CASES

MEMORANDUM IN SUPPORT OF EDF MOTION FOR LEAVE TO OBTAIN DISCOVERY FROM RESPONDENT EPA

The Environmental Defense Fund (EDF) moves for leave to take depositions from or, in the alternative, to serve interrogatories on five (5) key EPA officials.[1] After the January 15, 1979, close of the public comment period for the new source performance standards (NSPS), these officials participated in no fewer than six (6) meetings with private parties, members of Congress, and senior government officials, who advocated strongly against adoption of the more stringent new source performance standards for steam electric generating units to which the respondent EPA had at that time restricted its consideration. The EPA also received letters and telephone calls from the same interested parties. There is a substantial likelihood that these communications significantly changed the NSPS.

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[1] Douglas M. Costle, Administrator; Barbara Blum, Deputy Administrator; David Hawkins, Assistant Administrator for Air and Waste Management; Charles Warren, Regional Administrator for Region II, formerly Director, Office of Legislation; and Walter Barber, Director, Office of Air Quality Planning and Standards.

I. *Need for Discovery*

On September 19, 1978, proposed new source performance standards (NSPS) were published (43 Fed. Reg. 42154). Public comments were requested by December 15, 1978. Public hearings were held December 12 and 13, the record of which was held open until January 15, 1979. The final NSPS were published June 11, 1979 (44 Fed. Reg. 33580). After closing of the record on January 15, 1979, EPA received and entered in the record scores of comments. Telephone comments were also received. In addition, senior EPA officials are known to have participated in at least the following six (6) meetings:

Meeting Date	*Participants*[2]
March 14, 1979	EPA, DOI, CEQ, DOE, White House
March 28, 1979	Senators, White House, Costle, numerous other parties
April 23, 1979	National Coal Association, and Senator Byrd
April 27, 1979	DOE, OMB, EPA (dry scrubbing technical briefing)
April 30, 1979	White House (President), Hawkins, Barber, Costle
May 2, 1979	National Coal Association, EPA, DOE, Senator Byrd, other congressmen

Prior to these meetings, the EPA had reduced the some 15 alternative standards under review to three (3):[3]

- full scrubbing: 90% removal (annual average), 0.55 lbs. SO_2/million BTU emission ceiling;
- partial scrubbing: 33% minimum removal (annual average), 0.55 lbs. SO_2/million BTU emission ceiling; and
- regional standard: full scrubbing in the West (11 states), partial scrubbing elsewhere.

Subsequent to these meetings EPA promulgated a standard with a ceiling of 1.2 lbs. SO_2/million BTU. As the

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[2] To the best of our knowledge.

[3] March 9, 1979, EPA memorandum from David W. Tundermann to Bill Drayton through Roy Gamse, subject: NSPS Update.

court is aware, it is the contention of the Sierra Club and EDF that there is a substantial likelihood that the advocacy of interested parties at the above-listed meetings significantly changed the standards. *Cf.* §307(d)(8) of the Clean Air Act, 42 U.S.C. §7607(d)(8) ("the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."). It is apparent that in order for the court to review and decide this controversy, it must know what happened during these private, undocumented or poorly documented, conversations and meetings. *See e.g., U.S. Lines v. Federal Maritime Commission*, 189 U.S. App. D.C. 361, 375, 584 F.2d 519, 533 (1978). *Cf. Home Box Office, Inc. v. FCC*, 185 U.S. App. D.C. 142, 190, 567 F.2d 9, 57 (1977) ("If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.") The court can know those happenings only through the requested discovery.

II. *Court Has Authority to Order the Requested Discovery*

> "A reviewing court has inherent power to obtain evidence needed to enable it to decide a contention of this sort [that is that] because of procedural irregularity, [the decision maker's] determination was a nullity." *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144 (2d Cir. 1974), *cert. denied*, 419 U.S. 874, 95 S.Ct. 135 (1974).

In *National Nutritional Foods Association*, the Court of Appeals held that it could order the taking of depositions of the decision maker by a party challenging promulgated rules. The court's holding has never been challenged. Indeed, in remanding *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 82[illegible] (1971), the Supreme Court stated that, "The Court may require administrative officials who participated in the decision to give testimony explaining their action." See *Home Box Of-*

fice, Inc. v. FCC, 185 U.S. App. D.C. at 185, 567 F.2d at 52 (court *sua sponte* ordered the Commission to provide "a list of all of the *ex parte* presentations, together with the details of each, made to it, or to any of its members or representatives, during the rulemaking proceedings.")

III. *The "Mental Processes Rule" is Inapplicable*

The requested discovery will be limited to the discussions which occurred in post-comment period meetings. Petitioner is simply seeking to establish, as precisely as possible, what was said at these meetings. No inquiry into mental processes of the decision-maker will be made. Therefore, the restrictions of the "mental processes rule" of *Morgan IV*[4] are inapplicable.

Assuming, *arguendo*, that the requested discovery were an inquiry into the mental processes of the decision maker, the "mental processes rule" is still inapplicable. *Morgan IV* was decided at the final stage of litigation "after all claims of procedural and constitutional irregularity had been put to rest...." *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 207 (4th Cir. 1964). "In an earlier stage of the litigation, *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L. Ed. 1129 (1938), when there had been more than a colorable claim of procedural irregularity, examination of the Secretary, and the receipt of other evidence, to determine if there had been a denial of a constitutional right was relied on in support of the conclusion that the hearing was fatally defective." *Id.*

> "[T]he mental process rule is but 'one facet of the general presumptions of regularity' which attaches to decisions of administrative bodies. Thus, we conclude, where a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable." (Citations omitted.) *Id.* at 208. See *Hercules, Inc. v. EPA*, ___ U.S. App. D.C. ___, 598 F.2d 91, 123 (1978). *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 420, 91 S.Ct. at 825.

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[4] *United States* v. *Morgan*, 313 U.S. 409, 421-22, 61 S.Ct. 999, 1004 (1941).

As already stated, *ex parte* conversations, comments, and no fewer than six (6) meetings occurred after close of the NSPS record. These communications violated the restrictions on *ex parte* communications generally, *National Small Shipments, etc.* v. *ICC*, 191 U.S. App. D.C. 214, 220, 590 F.2d 345. 351 (1978) ("the statutory requirement of a hearing [excludes] ... recourse to *ex parte* communications."), *U.S. Lines* v. *Federal Maritime Commission*, 189 U.S. App. D.C. 361, 375-76, 584 F.2d 519, 533-34 (1978), and restrictions on congressional interference specifically, *Koniag, Inc., Village of Uyak* v. *Andrus*, 188 U.S. App. D.C. 338, 347, 580 F.2d 601, 610 (1978), *cert. denied*, 439 U.S. 1052, 99 S.Ct. 733 (1979) (letter from Congressman to Secretary two days before reversal of a decision "compromised the appearance of the Secretary's impartiality," even though it did not name any particular claimants); *American Public Gas Assn'* v. *FPC*, 186 U.S. App. D.C. 23, 78, 567 F.2d 1016, 1069 (1977), *cert. denied*, 435 U.S. 907, 98 S.Ct. 1456-57 (1978) (whether proceeding is a judicial or a legislative function, "Congressional intervention which occurs during the still-pending decisional process of an agency endangers, and may undermine, the integrity of the ensuing decision, which Congress has required be made by an impartial agency charged with responsibility for resolving controversies within its jurisdiction."). Prior to these communications, the respondent (EPA) had reduced the alternatives being considered to three,[5] all more stringent than the standard finally promulgated after these *ex parte* communications. Even if the requested discovery were an inquiry into mental processes, these facts[6] are a sufficiently strong showing of improper behavior to overcome the "presumption of regularity" which prevents inquiry into decision-maker mental processes.

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[5] *See* note 3, *supra*.

[6] *See also* 44 Fed. Reg. 33595-96 (As a result of the April 5, 1979 meeting between EPA and National Coal Association representatives, "the Administrator revised his assessment of state-of-the-art coal cleaning.").

CONCLUSION

EPA officials participated in a number of *ex parte* conversations and meetings after the close of the NSPS record. The final promulgated NSPS was not among the three alternative standards under review before the meetings and was less stringent. The three alternative standards under review before the meetings were opposed by the interested parties at the meetings. This court has inherent authority to obtain evidence of the conversations and meetings. The taking of depositions by petitioner is an approved method of obtaining the necessary evidence. The requested discovery is not an inquiry into "mental processes" but, even if it is, it is permissible because of the strong showing of improper behavior by the respondent.

For these reasons, petitioner is asking this court for leave to take depositions of senior EPA officials who have knowledge of the post-comment period conversations and meetings.

Respectfully submitted,

/s/ ROBERT J. RAUCH
Staff Attorney
/s/ LARRY MARTIN CORCORAN
Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

No. 79-1565

SIERRA CLUB, PETITIONER,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
OF THE ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

NATIONAL COAL ASSOCIATION
ALABAMA POWER COMPANY, ET AL., INTERVENORS.

AND CONSOLIDATED CASES

BEFORE: McGOWAN*, MIKVA and EDWARDS; *Circuit Judges*

ORDER

Upon consideration of the petitioner's motion for leave to obtain discovery, the opposition and replies thereto, and the entire record in this case, it is

ORDERED by the Court that the aforesaid motion is referred to the division of this Court to be drawn to hear this case on the merits.

The parties in their briefs should address the petitioner's entitlement to the information requested, and the petitioner's need for the information requested in order to prosecute its case fully.

IT IS FURTHER ORDERED by the Court that the respondent shall submit to the Court within five days of the date of this order an affidavit(s) providing information

*Circuit Judge McGowan did not participate in the foregoing order.

about the following meetings, identified here by date with reference to the petitioner's motion:

March 14, 1979; April 23, 1979; April 27, 1979; April 30, 1979; and May 2, 1979.

The affidavit(s) shall identify the participants in the foregoing meetings, and shall describe as fully and accurately as possible how the meetings came to be held and the approximate length of each.

IT IS FURTHER ORDERED by the Court that briefs in this case shall be submitted pursuant to the following schedule:

Petitioners' brief(s)—10 days after filing of respondent's affidavit

Respondent's brief—30 days after filing of petitioners' brief(s)

Intervenors' brief(s)—15 days after filing of respondent's brief

Reply brief(s)—12 days after filing of intervenors' brief(s)

Per Curiam

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Filed August 25, 1980

No. 79-1565 and
Consolidated Cases

SIERRA CLUB, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

MOTION FOR LEAVE TO FILE AFFIDAVIT

Respondents hereby move for leave to file the attached affidavit of David G. Hawkins, EPA Assistant Administrator for Air, Noise and Radiation. The following grounds support the granting of this motion.

1. On April 11, 1980, petitioner Environmental Defense Fund (EDF) moved for leave to obtain discovery. One of EDF's main arguments was that meetings attended by EPA officials concerning the NSPS rulemaking were not adequately documented for the purposes of judicial review.

2. On June 16, 1980, this Court issued an order that EPA should submit affidavits providing specified information on meetings held on March 14, April 23, April 27, April 30, and May 2, 1979.

3. On June 24, June 25, and July 9, 1980, EPA filed affidavits providing the information specified by the Court's June 16 order.

4. EDF has objected in its opening brief that relevant meetings are still undocumented. EDF Br. at 44.

5. First, EDF objects that the EPA affidavits discuss only one Executive Branch meeting on April 30: a briefing on dry scrubbing (June 24 Hawkins affidavit, paragraph 4). EPA had assumed that it was this April 30 meeting that EDF wanted documented, since EDF referred to it in its discovery papers. EDF Motion for Leave to Obtain Discov-

ery from Respondent EPA at 3, n * and Attachment C. It appears that EDF meant to refer to the other April 30 meeting (or to both). The attached affidavit therefore provides the information specified by this Court's order of June 16 for the other April 30 meeting.

6. EDF also objects that a May 1, 1979 meeting is undocumented. Although this meeting was not covered by the Court's June 15 order, nor was it mentioned in EDF's discovery papers, the attached affidavit supplies the information that would be required if it were covered by the order.

Respectfully submitted,

/s/ CHARLOTTE URAM

Attorney, Pollution Control Section
U.S. Department ofJustice
Tenth and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/ EARL SALO

Attorney, Air, Noise and Radiation Division
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed September 5, 1980

CITY OF WASHINGTON
SS:
DISTRICT OF COLUMBIA

AFFIDAVIT

David G. Hawkins declares as follows:

1. I am the Assistant Administrator for Air, Noise and Radiation of the Environmental Protection Agency. I supervised the development of the rule establishing new source performance standards for electric utility steam generating units, which was promulgated by the Administrator on June 11, 1979. 40 C.F.R. Part 60, Subpart Da; 44 Fed. Reg. 33580.

2. On April 30, 1979, EPA officials briefed the President and Executive Branch officials on the issues and options presented by the rulemaking. The briefing was held on EPA's initiative, as part of the Agency's policy of briefing the Executive Branch on major EPA actions. It lasted about one hour. It was attended by the following persons: President Carter; James Schlesinger, Secretary of Energy; Charles Schultze, Chairman of the Council of Economic Advisors; Charles Warren, Chairman of the Council on Environmental Quality; Alfred Kahn of the White House Staff; Stu Eizenstat, Advisor to the President for Domestic Policy; Kitty Schirmer and perhaps Simon Lazarus of the President's Domestic Policy Staff; Jim McIntyre and Elliot Cutler of the Office of Management and Budget; Douglas Costle, EPA Administrator; myself; and other employees of the offices of the above persons, whose names I do not recall.

3. On May 1, 1979, EPA officials briefed staff members of the Senate Committee on Environmental and Public Works on EPA's analysis of the effects of alternative emission ceilings on coal reserves. The briefing was held at

EPA's initiative, and was substantially the same as the briefing given to Senator Robert Byrd on May 2. The briefing lasted about one hour. It was attended by Phil Cummings, Committee Staff Director, perhaps by John Yago, Committee Chief Counsel and by other members of the Committee Staff whose names I do not recall, Walt Barber and John Haines of EPA's Office of Air Quality Planning and Standards, other EPA employees whose names I do not recall, and myself. No persons other than Committee Staff members and EPA officials attended the briefing. It was an oversight that I did not have a memorandum of this briefing prepared for the rulemaking docket.

/s/ DAVID G. HAWKINS
Assistant Administrator for
Air, Noise & Radiation

Executed on 8/14/80

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

June 11, 1981

Embargoed for Release
6:00 p.m. E.D.T.
June 13, 1981

M-81-9

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DAVID A. STOCKMAN
DIRECTOR

SUBJECT: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual com-

munications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle*, No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)

Supreme Court of the United States

No. 82-242

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER,

v.

SIERRA CLUB, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 18, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-242

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOSEPH J. BRECHER
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SONG PRINTING COMPANY OF CALIFORNIA, 366 FIRST STREET, SAN FRANCISCO 94105

QUESTION PRESENTED

Whether the court below properly construed Clean Air Act Section 307(f), 42 U.S.C. Section 7607(f) by awarding attorneys fees to respondents under the circumstances of this case, even though they did not prevail on the merits.

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No. 82-242

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

STATEMENT

In general, the Sierra Club agrees with the facts as presented in the government's petition. But the statement fails to put into proper context the nature of the underlying litigation, *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). The extraordinary length and level of detail of the opinion shows that the issues were substantial and the case was very close. The court reached its decision only "... after interminable record searching (and considerable soul searching)." 657 F.2d at 410. It agreed with two of the Sierra Club's major contentions—that dry scrubbing technology was not adequately demonstrated and did not provide a proper justification for EPA's action (657 F.2d at

341, note 157, 351); and that the procedural history of the adoption of the standard was improper. 657 F.2d at 356.

Nonetheless, the court below felt constrained to uphold EPA's decision for two principle reasons. First, Clean Air Act section 307(d)(8) (42 U.S.C. section 7607(d)(8)) provides an unusually strict standard of judicial review:

> In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such error had not been made.

See, *e.g.*, 657 F.2d at 353, 391-92, 396. Second, the Court of Appeals heeded this court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) against ". . . [I]mposing its own notions of proper procedures upon an administrative agency entrusted with substantive functions by Congress." 657 F.2d at 391-92.

In short, while the Court of Appeals found many of the Sierra Club's criticisms of EPA's action to be justified, those errors were not of sufficient magnitude to require reversal. Nonetheless, by pointing them out to the court and the agency, the Sierra Club "aided agency implementation" of the Clean Air Act, (672 F.2d at 37) by instructing EPA on a better (albeit not mandatory) way to conduct rule-makings concerning the role of emerging technology on air pollution standards.

The litigation also aided the implementation of the Clean Air Act by evoking a judicial determination on the permissible scope and limits of the use of macro-economic computer modeling and econometric forecasting in EPA's decision-making process. The Court of Appeals noted: "our

ruling on this question will inevitably affect agency procedures in a number of substantive contexts." 672 F.2d at 40. The Court of Appeals established several "safety valves" which an agency must observe in the process of econometric modeling: public exposure of the assumptions and data put into the model; acceptance and consideration of public comment; admission of uncertainties; and ". . . the insistence that ultimate responsibility for the policy decisions remains with the agency rather than the computer." 657 F.2d at 33.

Finally, the government's statement neglects to point out that the Court of Appeals also turned aside a challenge by industry to the effect that a 90% reduction in sulfur dioxide emissions is not technologically feasible. The court below specifically acknowledged the Sierra Club's contribution to the successful resolution of this issue, which "... would have been far less completely aired without Sierra Club's participation." 672 F.2d at 41. The opinion also noted that ". . . [T]he agency's response to several challenges asserted by the utilities was effectively supplemented by the efforts of the environmental groups." 672 F.2d at 36.

REASONS FOR DENYING THE PETITION

Under Rule 17 of this Court's rules, certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rules 17(a) through (c) set forth two basic reasons for granting the petition—a conflict in judicial decisions or the existence of an important question of federal law "which has not been, but should be, settled by this Court . . ." As we show below, neither of these criteria are satisfied here. While the policy of permitting attorneys fees to losing parties in certain limited cases *does* constitute an important legislative departure from past times, it is *not* a matter which needs to be settled by this court. Congress has

already spoken to the issues in a clear and unambiguous way. Plainly, the Court of Appeals interpreted the statute correctly; there is no call for this court to exercise its supervisory functions in this case. (See Point 1) Furthermore, judicial construction of the fees provision of the Clean Air Act and similar statutes has consistently and unanimously agreed with the court below. (See Point 2)

1. *Congress intended to give courts discretion to award fees to non-prevailing parties under Clean Air Act § 307(f) in appropriate cases.* Both the statutory language and the legislative history unambiguously support the Court of Appeals' interpretation of section 307(f). That section states in pertinent part:

> In any judicial proceeding under this section the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

The court below noted, "on its face, the statutory provision clearly permits the court to award attorneys fees to prevailing, substantially prevailing, or non-prevailing parties in 'appropriate' cases." 672 F.2d at 34.

The legislative history of section 307(f) is crystal clear. The House Report states:

> In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely

> on the grounds set forth in *NRDC v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973). H. Rep. No. 95-294, 95th Cong., 1st Sess., p. 337 (1977).

The key language from the *NRDC* case cited by the House Report is as follows:

> We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

The opinion below pointed out that in the 1977 amendment "Congress made a clear choice between two different attorneys fees provisions . . .", rejecting a proposal calling for fees only to prevailing or partially prevailing parties in favor of the "far broader policy" of § 307(f) as enacted, allowing fees to *any* party whenever they are found to be "appropriate". See 672 F.2d at 35, note 3 citing A Legislative History of the Clean Air Act Amendment of 1977, 3644, 3817 (1978).

The government argues (Petition, p. 9) that "mere judicial 'interpretation' " of the Clean Air Act was not a benefit which Congress intended to reward with fees. But the *NRDC* case cited in the House Report and discussed above specifically noted that "early interpretation" of "novel and complex" portions of the Clean Air Act is "desirable". *NRDC v. EPA*, 384 F.2d at 1338. As the Court below concluded:

> This legislative history makes it difficult to escape the conclusion that the statutory goals of the Clean Air Act can be furthered by parties who make a substantial contribution to the interpretation and development of the Act, [citation], as well as by substantially prevailing parties and parties who win a favorable result other than by receiving a favorable verdict. 672 F.2d at 35, note 3.

Confronted with substantial and unambiguous evidence that Congress meant to allow fees to be awarded to non-prevailing parties, the government invites this court to reconstruct that history on the basis of its peculiar reading of the legislative history of *another* section of the Clean Air Act, enacted seven years earlier. Similarly, the government suggests that this Court adopt its debatable interpretation of the holding and import of the *NRDC* case in place of the reading given by Congress. Neither of these efforts to rewrite the clear legislative history is entitled to credence.

The government maintains that the meaning of Clean Air Act section 307(f) (added in 1977) "can only be determined by tracing its origins in the Clean Air Act of 1970." Petition, p. 16. The petition then discusses the history of § 304(d) of the Clean Air Act, 42 U.S.C. section 7604(d), added in 1970, which provides for fees in "citizen suits" brought in the district courts. The government points to two purposes of § 304(d), as reflected in the Senate Report—to discourage frivolous litigation and to encourage citizens to bring "legitimate actions", including those "which result in succesful abatement, but do not reach a verdict." S. Rep. No. 91-1196, 91st Cong., 2nd Sess, 36-37, 38-39 (1970). The government argues that the Senate Report, given a "careful reading", equates "legitimate actions" with "succesful actions", because the Report refers to only a single type of "legitimate action", one in which abatement occurs before judgment is obtained. See Petition, pp. 16-19.

The court below dealt with this argument as follows:

> While the only example of a non-prevailing party awarded attorneys' fees expressly cited in the Report is one where the case was mooted by abatement, we do not read the Report as ruling out all other instances where attorneys' fees would be appropriate. And, in any case, we cannot disregard the clear legislative history *specific* to section 307 [discussed above] . . . That history shows that Congress in 1977 specifically adopted the far broader policy of awarding substantial contributions to the statutory goals of the Act. 672 F.2d at 35, note 3.

The government (Petition, p. 24) disagrees, arguing that section 307(f) was enacted for a "narrow purpose", merely to "conform" section 307 with section 304(d). The Senate Report does, undoubtedly, indicate a desire to allow fees under section 307, as well as section 304. But that was not the only purpose of the 1977 legislation. As noted above, the House Report sets forth another goal: ". . . to encourage litigation which will assure proper implementation and administration of the Act or otherwise serve the public interest." To that end, the House Committee specifically stated that non-prevailing parties could get fees when appropriate, and endorsed the language to that effect in *NRDC v. EPA*, *supra*. See H. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977). A subsidiary purpose was to "meet the requirement for specific authorization imposed by 28 U.S.C. § 2412 and by the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

As the Conference Report noted, both the House and Senate version of the fees provision under section 307 were adopted in conference. H. Rep. No. 95-564, 95th Cong., 1st Sess., p. 177 (1977). Thus, it is an inaccurate and misleading interpretation of the legislative history to contend that

the sole objective of the 1977 Amendment to § 307 was to conform it to the supposedly limited scope of section 304(d). The 1977 Senate Report reveals no such restrictive purpose and the House Report clearly shows that Congress intended to do far more than merely extend the provisions of § 304(d) to actions under § 307—instead, it reacted to more recent developments, endorsing the rationale of the *NRDC* opinion.

In any event, Congress intended to allow fees to non-prevailing parties under Section 304(d). Sen. Spong, a prominent supporter of the 1970 Clean Air Act amendments, remarked during debate on section 304(d): "The courts are given discretionary authority to award costs, including reasonable attorney and witness fees to any party." Senate Consideration of the Report of the Conference Committee, December 18, 1970, reprinted in "A Legislative History of the Clean Air Act Amendments of 1970", 93rd Cong., 2nd Sess., volume 1, p. 147 (1974).

The courts, too have unanimously construed section 304(d) to allow fees to non-prevailing parties. See, *e.g., Natural Resources Defense Council v. EPA, supra,* 484 F.2d 1331, 1338 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.,* 62 F.R.D. 353, 355 (D. Del. 1974); *Citizens Association of Georgetown v. Washington,* 383 F.Supp. 136 (D.D.C. 1974), *reversed on other grounds,* 535 F.2d 1318 (D.C. Cir. 1976); *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981). In summary, even if one accepts the dubious argument that Congress meant section 307(f) to do no more than track section 304(d), the courts would still have discretion to award fees to non-prevailing parties.

A recent legislative development reenforces the construction of § 307(f) by the Court of Appeals. During a

mark-up session on amendments to the Clean Air Act before the Senate Environment Committee on August 19, 1982, Sen. Simpson offered an amendment which would limit fee awards to prevailing parties. The Committee voted to adopt the proposed amendment. The relevant portion of the hearing transcript is attached as Appendix A. Obviously, Senator Simpson's proposal would have been unnecessary if, as the government contends, existing law already denied fees to non-prevailing parties.

The government argues that a party must prevail on at least some issues in order to be entitled to an award under section 307(f) (Petition, pp. 25-26). It maintains that a "close reading" of *Natural Resources Defense Council v. EPA, supra,* supports that conclusion, noting that the petitioners in *NRDC* were actually successful on some issues. Thus, it is argued, the court's actual holding was that fees would be paid only on successful issues. But the court did not indicate that fees should be withheld on the losing issues. The opinion stated: "But the challenges here, *even those not sustained,* were mainly constructive and reasonable." 484 F.2d at 1338 (Emphasis supplied). Thus, both the language and the holding of the *NRDC* case support the principle that fees may be awarded on losing issues.

The government (Petition, pp. 13-14) contends that the statute should be construed so as to be consistent with "certain fundamental considerations underlying the doctrine of sovereign immunity and the traditional rules governing the allocation of attorneys' fees." This contention is difficult to take seriously, in view of the government's concession that the legislative history "... clearly demonstrates that Congress meant to waive the government's traditional immunity and to overcome the presumption of the 'American Rule' against fee shifting." (Petition, p. 15). As noted above, the legislative history states specifically that section 307(f)

was intended to meet the requirements of the *Alyeska* case to waive sovereign immunity and the "American Rule" by means of specific legislative reference.

2. *The courts have unanimously supported the decision below.* Statutes such as Clean Air Act § 307(f), which permit a court to award fees to any party when "appropriate", have consistently and without exception been construed by the courts to permit the award of fees to losing parties. Those decisions are discussed in the opinion below at 672 F.2d 36-38. The first such case was *Natural Resources Defense Council v. EPA,* 484 F.2d 1331 (1st Cir. 1973) which, as noted above, was endorsed by the House Committee which drafted § 307(f). A year later, the district court for Delaware construed Clean Air Act section 304(d), concluding that "ultimate success in a citizen's suit was not intended to be a prerequisite to an award." *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.,* 62 F.R.D. 353, 355 (D. Del. 1974).

A third early decision to the same effect was *Citizens Association of Georgetown v. Washington,* 373 F.Supp. 136 (D.D.C. 1974), *reversed on other grounds,* 535 F.2d 1318 (D.C. Cir. 1976). Once again, the plaintiffs were unsuccessful in an effort to prove a violation of Clean Air Act standards. Nevertheless, they were awarded attorneys fees "...because the litigation had furthered the act's purpose of encouraging citizen suits to accelerate enforcement of the Clean Air Act." 672 F.2d at 37.

In *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981) the District of Columbia Circuit reversed a district court decision refusing to award fees under section 304(d) because the plaintiffs had not prevailed. The Court of Appeals ruled

that the lower court had "incorrectly focused attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision . . ." 639 F.2d at 804. The court concluded that Congress intended fees to be awarded "whenever the underlying suit was a prudent and desirable effort to achieve an unfulfilled objection of the Act." *Ibid.*[1]

The most recent judicial pronouncement on this subject is *Northern Plains Resource Council v. EPA*, ... F.2d ...., 17 E.R.C. 1343 (9th Cir. No. 79-7618, March 1, 1982). There, the Ninth Circuit awarded fees to a losing party under section 307(f) of the Clean Air Act. The court found the issue so unremarkable that its discussion of the propiety of the award was restricted to three short paragraphs. It concluded:

> We agreed with the D.C. Circuit that in determining whether a party—prevailing or non-prevailing—can recover attorney's fees under section 307(f) from the government, the test is "whether in the light of what was known . . . when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorney's fees." 17 E.R.C. at 1344, quoting *Metropolitan Washington Coalition for Clean Air v. District of Columbia, supra*, 639 F.2d 802, 804.

CONCLUSION

The decision of the court below is fully supported by the statutory language, the legislative history, and a substan-

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1. See also *Northslope Borough v. Andrus*, 515 F.Supp. 961 (D.D.C. 1981) (appeal pending), awarding fees to unsuccessful plaintiffs on the basis of "appropriate" fee authorizations in the Endangered Species Act, 16 U.S.C. § 1640(g)(4) and Outer Continental Shelfs Land Act, 43 U.S.C. § 1349(a)(5).

tial body of judicial precedent. Confronted with all these authorities, the government resorts to a twisted reading of the statute and a narrow, crabbed interpretation of the cases to bolster its point of view. Its basic contention, stripped of its flimsy legal justification, is that awarding fees to non-prevailing parties is not a good idea. As this court has so often noted, such an argument should be made to Congress, not the courts.

This court should not take seriously the government's assertion that the decision below "threatens to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation." (Petition, p. 8). Fears that the decision will open a "floodgate" of litigation under the Clean Air Act and other statutes which provide for fees in "appropriate" cases is unfounded. Potential litigants are still faced by substantial expenses and risks even if fees might be available if they lose. First, as the court below noted, litigants are *not* entitled to fees for the substantial effort that must be put in to the administrative proceedings which precede the appeal. 672 F.2d at 42. In this case, for example, the Sierra Club devoted at least 721 hours to administrative proceedings leading up to the litigation, far more time than was spent on compensable judicial litigation. See Sierra Club's Amended Request for Attorneys Fees, October 13, 1981. Second, a fee award is by no means assured even for judicial litigation. The court below noted that fees will be awarded to non-prevailing parties only in "exceptional" circumstances. 672 F.2d at 39.

Thus, contrary to the government's insinuation, the decision below will not cause a rush to the courthouse by litigous lawyers and clients. The substantial expenses and

uncertainties connected with major litigation under the Clean Air Act will remain to deter all but the most consequential and important lawsuits. Those are precisely the kinds of suits that Congress intended to promote under § 307(f). The petition for a writ of certiorari should be denied.

September 13, 1982

Respectfully submitted,

JOSEPH J. BRECHER
Attorney for the Sierra Club

Appendix A

Stenographic Transcript Of

HEARINGS

Before The

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

MARK-UP SESSION

THE CLEAN AIR ACT

August 19, 1982

WASHINGTON, D.C.

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Senator Simpson. Mr. Chairman, I do appreciate very much coming to this point where I have three remaining amendments and hopefully, they can be disposed to today.

The first two were the ones with regard to attorney's fees. I think I explained that rather clearly the other day. We had in the Act two places where a court may award the costs of litigation, including attorney's fees "Whenever it determines that such an award is appropriate."

May we have order, Mr. Chairman?

Senator Stafford. Yes. The Chair would ask that the committee and especially our guests will kindly refrain from audible conversations. The Senator is making an important statement about an important amendment. The Chair would dislike to have to ask any of our guests to leave, but we do want order so the Senator's amendment can be heard and the statement in support of it.

Senator Simpson. Thank you.

The present language simply states that "Those fees may be awarded whenever it is determined that such an award is is appropriate." The purpose of the amendment, because of what has occurred recently in the District of Columbia Circuit where we have seen the award of attorney's fees to parties who have sued the government and lost on all counts, my amendment would simply restrict such awards for attorney's fees to "prevailing or substantially prevailing" parties, which is a limitation which is most commonly used in almost every other statute; many, many statutes in my research where I found that we had some 110 different statutes and 97 of them were limited in the manner in which I suggest.

I think it is just too much to ask the taxpayers to pay the expenses of someone who sues the government and loses at every step of the proceedings. That is the purpose of my amendment.

Senator Stafford. Is there discussion of this amendment?

Senator Baucus. Mr. Chairman.

Senator Baucus. Mr. Chairman, I want to thank the Senator from Wyoming for offering this amendment. I have offered the same kind of amendment in other cases, in tax cases and also other cases in either Tax Court or Federal District Court, where taxpayers who are suing are on the receiving end of the suite from Uncle Sam and where they prevail and were awarded attorney's fees, too. We thought that provision was gone. I thank the Senator from Wyoming for performing the same service here.

Senator Simpson. I thank the Chairman.

Senator Domenici. Could I ask the Senator from Wyoming, I know that the statutes are not consistent or homogeneous on attorney's fees. I support your amendment, but I wonder, will this be the single test for environmental lawsuits, or are there other statutes that they might impose on court as providing a different standard from whence they would be entitled? If so, should we not say this is the only quality of measuring attorney's fees and make it absolutely clear? Are you certain that it will be this and no other test?

Senator Simpson. I think in my research, Pete, I found 110 different statutes allowing the awarding of attorney's fees. There are 13 statutes, admittedly principally involved with environmental matters, but not all, who discuss this term "awards as appropriate."

(10:55 a.m.)

Senator Simpson. There are environmental statutes whereby the award is to the prevailing parties or substantially prevailing. 97 out of those statutes limit the awards to prevailing parties or in some way restrict the award.

Senator Domenici. So you are satisfied that this is going to become the test if it becomes law and they are not going to have another statute to look at to say, "There is another test"?

Senator Simpson. I think this would be the test.

Senator Domenici. For this kind of lawsuit?

Senator Simpson. I think so, certainly under the Clean Air Act, obviously.

Senator Stafford. Is there further discussion? Is there a request for a roll call?

Senator Simpson. No.

Senator Stafford. Hearing none, all those in favor of the amendment will say aye.

(Chorus of ayes.)

Senator Stafford. Those opposed, no.

Senator Stafford. No.

The ayes appear to have it. The ayes do have it. The amendment is adopted.

Office - Supreme Court, U.S.
FILED
SEP [illegible]
ALEXANDER L. STEVAS,
CLERK

No. 82-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, Administrator,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB and
ENVIRONMENTAL DEFENSE FUND,
Respondents.

BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals abused the discretion expressly conferred upon it by the Clean Air Act by making an award of attorneys' fees in this case based upon its finding that the litigation furthered the goals of that Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-242

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Respondents.

BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

STATEMENT

The Statement set forth in the Petition[1] omits several pertinent aspects of this case and mischaracterizes the degree of success achieved by the Environmental Defense Fund and the Sierra Club. First, it fails to set forth adequately the sheer volume and complexity of the litigation. As summarized by the Court of Appeals,

[1] Citation references to the Petition will be abbreviated "Pet". Respondent Environmental Defense Fund will be referred to as "EDF" and petitioner will be referred to as "EPA".

> The technical complexity of the case necessitated extensive preparation by the parties and the court. In formulating the regulation, EPA had prepared 120 studies, collected 400 items of reference literature, received almost 1,400 comments, written 650 letters and 200 interagency memoranda, held over 50 meetings and substantive telephone conversations with the public, and conducted four days of public hearings. The statement accompanying the regulation took up to 43 triple columns of single-spaced type. Approximately 700 pages of briefs were submitted to this court on the merits of the case. The joint appendix contained 5,620 pages, bound in twelve volumes. The certified index to the record listed over 2,520 submissions. Seven months after oral argument, this court emerged with a 250 page opinion upholding the agency's regulations.
>
> *Sierra Club* v. *Gorsuch*, 672 F.2d 39-40 (D.C. Cir. 1982); Pet. at 14a-15a (footnote omitted).

After analyzing this massive record, the Court of Appeals was in a uniquely appropriate position to assess the contribution of the parties toward the resolution of important and complex issues.

Second, the EPA petition largely ignores several significant consequences of the Court of Appeals' ruling on the merits. In responding to EDF's challenges to EPA's conduct, the Court of Appeals held that both due process and the new rulemaking procedures of section 307 of the Clean Air Act, 42 U.S.C. § 7607, require EPA to comply with three requirements concerning oral communications after the close of the comment period. First, EPA must docket all such communications which it considers to be "of central relevance to the rulemaking." *Sierra Club* v. *Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981). Second, meetings with other executive branch officials need not

be docketed where they involve policy discussions only and EPA does not seek to rely on any "information or data" arising from such meetings. *Id.* at 404-07. Third, the Court held that congressional contacts with the Agency will not invalidate a rulemaking where the communications focus on the substance of the proposed rule itself and do not include any effort designed to force the Agency to consider factors "not made relevant by Congress in the applicable statute." *Id.* at 408-10.

Although the Court of Appeals concluded, on the basis of the factual record, that these standards had not been violated in the present case, it also noted that much of the information necessary to make that determination was unearthed only as a result of EDF's efforts during the pendency of the appeal. 672 F.2d at 41; Pet. at 18a. Equally important, procedures for informal rulemaking for the entire executive branch have been altered, apparently in direct response to the Court of Appeals ruling in this case. On June 11, 1981, David A. Stockman, Director of the Office of Management and Budget, issued a memorandum to the heads of executive departments and agencies setting forth procedures to be followed for transmission of factual communications to agencies engaged in informal rulemaking.[2] (App. A, 1a-2a.) The memorandum sets forth measures to ensure that factual communications received by OMB from the public will also be transmitted to the agency "for inclusion in the rulemaking record" and admonishes that the "agencies receiving such materials from the public should take care to see that they are placed in the record." (App. A, 1a.) The memorandum also addresses the question of factual material developed by OMB itself, and states that "such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking." (App. A, 2a.) Finally, the memorandum emphasizes that "our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle*,"

[2] A copy of the Memorandum is attached hereto as Appendix A (hereafter "App. A").

which had been decided a few months earlier. The "Stockman memorandum" cites no legal authority other than the Court of Appeals' ruling in this case and it addresses issues which were raised in this case only by EDF.

Finally, on the basis of its familiarity with the record, the Court of Appeals was able to assess the contribution made by each of the respondents in resolving a case which all the parties recognized to be of national importance. 672 F.2d at 39; Pet. at 14a. As the Court noted, it was totally dependent upon Sierra Club to brief and advocate certain issues, and EPA was significantly assisted by Sierra Club's support in defending certain aspects of the regulation in face of an industry challenge. 672 F.2d at 41; Pet. at 17a. Similarly, the Court applauded the "critical role played by EDF in the Court's premier interpretation of the rulemaking procedures laid down in the 1977 Amendments" of the Clean Air Act. 672 F.2d at 41; Pet. at 17a. After noting EDF's contribution, involving factual research and legal analysis, and that several documents relating to post-comment period contacts with EPA were made available to the public for the first time as a result of EDF's challenge, the Court stated it had "little doubt that without EDF's substantial contribution to this aspect of the case, our deliberations would have been less enriched and more time consuming." 672 F.2d at 41; Pet. at 18a. The consequences of this litigation and respondents' contributions thereto formed the basis of the Court of Appeals' conclusion that the respondents had furthered the goals of the Clean Air Act and, hence, that a fee award was "appropriate."

SUMMARY OF ARGUMENT

Certiorari should be denied herein for several reasons. First, the decision of the Court of Appeals to award attorney fees in this case was an exercise of discretionary authority conferred upon it by the Clean Air Act and accordingly is subject to review only for an abuse of that discretion. This Court stated in the *Alyeska Pipeline* case, 421 U.S. 240 (1975), that Congress determines the scope of the court's discretion to award fees. In this case, Congress conferred authority on the

court to make such an award under the Clean Air Act "whenever it determines that such an award is appropriate." 42 U.S.C. § 7607(f) (Supp. IV 1980). Congress consciously rejected any limitation of awards to parties who "prevailed" or who only "prevailed in part." The proper standard, explicitly suggested in the legislative history of the Act and applied by the Court of Appeals, is for the court to determine whether the litigation furthered the goals of the Clean Air Act. This standard has been accepted and approved by every federal court which has addressed the issue. In contrast, EPA suggests that the discretion of the courts is limited to awarding fees to "successful" litigants, but no court or legislative committee has ever expressed that interpretation. Moreover, the clear expression of congressional intent to authorize discretionary "fee shifting" and waive sovereign immunity overcomes the generalized rules of construction based upon sovereign immunity relied upon by EPA. Certiorari should thus be denied because the issue presented involves an exercise of discretion clearly within the authority of the Court of Appeals, based upon the factual record before it.

Second, certiorari should be denied because, under the proper standard, the decision below was sound. The litigation furthered the goals of the Clean Air Act by furthering proper implementation of the Act, resulting from early judicial guidance with respect to novel and complex issues. Moreover, this litigation produced "tangible accomplishments" and was "successful" in requiring EPA to divulge the factual circumstances of EPA contacts with the public, other executive branch officials and members of Congress, so that the propriety of those meetings could be assessed. Furthermore, in assessing those issues, the court established new standards for informal rulemaking, under which certain kinds of communications must be docketed in the rulemaking record. That ruling led promptly to a change in procedures for all executive branch agencies, apparently on the basis of the Court of Appeals' decision in this case. Finally, to use EPA's expression, the action was "legitimate" in that it involved important and

complex issues in regulatory schemes of national importance. Moreover, due to EPA's withholding of factual information with regard to outside contacts, EDF could not determine, at the outset of the case, the nature and substance of those contacts; thus, EDF had legitimate reason to bring this action. EDF's efforts succeeded in producing important and substantial benefits to the public.

Third, certiorari should be denied because the decision below will affect few other cases or parties. EPA's "floodgates of litigation" rhetoric ignores reality. Although fourteen fee award statutes using the identical standard were enacted several years ago and the courts have agreed upon the interpretation of those laws, fee awards to parties who do not "substantially prevail" are very rare. In fact, under those statutes, fees have occasionally been denied to a prevailing party. In short, the courts have handled the discretion conferred upon them in a sound manner and there is no important reason for this Court to review this case.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW AN EXERCISE OF DISCRETION.

A. The Clean Air Act Confers Broad Discretion on the Courts to Make Attorney Fee Awards.

In its Petition for Writ of Certiorari, EPA seeks this Court's review of an award of attorney fees under section 307(f) of the Clean Air Act (the "Act"). 42 U.S.C. (Supp. IV) § 7607(f). Although the Petition does not specifically rely on any of the characteristic reasons for granting review set forth in this Court's rules, EPA appears to contend that this case raises "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c). Petitioner inaccurately describes EDF and Sierra Club as "totally unsuccessful" in this litigation, Pet. at 15, and contends that the Court of Appeals lacked authority under the Act to award fees "to parties who do not prevail on any claim." Pet. at 14. Yet no court or legislative report has ever endorsed that interpretation

of the law. In fact, the question of entitlement to a fee award is clearly one which Congress has committed to judicial discretion and petitioner's remedy, if any, lies with Congress and not the courts. It would be wasteful of this Court's time and resources to review the massive record herein to determine whether, on the facts, there has been an abuse of discretion in this case.

There can be no serious question that the Court of Appeals had the authority to determine whether to make an award of fees in this case. Section 307(f) of the Act broadly provides, in part:

> In any judicial proceeding under this section, the court *may* award costs of litigation (including reasonable attorney ... fees) whenever *it determines* that such award is *appropriate.*
>
> 42 U.S.C. § 7607 (f) (Supp.IV 1980) (emphasis added).

This statutory language unmistakably grants the court the power to decide whether to make an award and indicates that the authority conferred is discretionary.

Prior decisions of this Court have recognized that the scope of discretion conferred upon the courts under fee award statutes is for Congress to determine. In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), this Court reversed an award of attorney fees for lack of statutory authorization, noting that various kinds of fee award statutes had been enacted and stating:

> Under this scheme of things, it is apparent that the *circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.*
>
> 421 U.S. at 262 (emphasis added).

While describing the various federal statutes which authorize fee awards, this Court recognized, in *Christiansburg Garment*

Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978),[3] that

> [s]ome of these statutes make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs. *But many of the statutes are more flexible*, authorizing the award of attorney's fees to either plaintiffs or defendants, and *entrusting the effectuation of the statutory policy to the discretion of the district courts.**
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> * *See, e.g.*, ... Clean Air Act, 84 Stat. 1706, 42 U.S.C. § 1857h-2(d) ... [i.e. § 304(d) of the Act, authorizing district court fee awards in terms identical to § 307(f)].
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> 434 U.S. at 415-16 (certain footnotes omitted, emphasis added.)

By the terms of section 307(f) of the Act, Congress plainly did not limit fee awards to certain parties depending on their degree of "success." Rather, "it entrust[ed] the effectuation of the statutory policy to the discretion of the ... courts." The significance of this point is reinforced by the legislative history. It reflects that on two separate occasions Congress consciously selected the current statutory provision over an alternative which would have limited the parties eligible for fee awards and restricted the discretion of the courts. In 1976, the Senate passed a bill, S. 3219, which contained the following provision:

> In any judicial proceeding under this Act in which the United States or an officer or employee thereof is a party (other than as an intervenor), any party other than the United States which *prevails* in such action

[3] The Court in *Christiansburg Garment* faced the question of the proper standard for fee awards to prevailing defendants under a statute authorizing an award to the prevailing party only. The important point is the Court's recognition of the varying "flexibility," as determined by Congress, provided under different statutes. The discretionary nature of fee awards under section 304(d) of the Act was also recognized in the *Alyeska* case, 421 U.S. at 261 n.35.

> *shall* recover from the United States the reasonable costs for such party's participation in such proceeding, including reasonable attorney's fees, expert witness fees, and the costs of any studies, analyses, tests, or engineering reports that the court finds were necessary to litigate such action. In any case in which such party *prevails in part*, the court shall have *discretion* to award such reasonable costs.
>
> S.3219, 94th Cong., 2d Sess. § 35 (1976) *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 at 4689 (1978) (hereafter "Legislative History") (emphasis added).

The House, however, passed a bill with a provision identical to the version finally enacted, and in the Conference Committee the House version prevailed. H.R. 10498, 94th Cong., 2d Sess. (1976), *reprinted in* Legislative History at 6071; H.R. Rep. No. 94-1742, 94th Cong., 2d Sess. (1976), *reprinted in* Legislative History at 4401.

Since the 1976 Conference Committee amendments did not pass during the 94th Congress, various bills were reintroduced the following January, including two bills introduced in the Senate. S.252 contained a fee award provision identical to the version rejected by the Conference Committee in the preceding Congress. S.252, 95th Cong., 1st Sess. §36 (1977), *reprinted in* Legislative History at 3644. In contrast, S.253 provided that the court "may" award reasonable attorney fees "whenever it determines that such an award is appropriate." S.253, 95th Cong., 1st Sess. §36 (1977), *reprinted in* Legislative History at 3817. The Senate Committee opted for the latter provision, which ultimately was enacted.

The congressional choice between these provisions is important in two respects. First, the rejected provision would have limited the discretion of the courts by mandating awards to prevailing parties. Second, the rejected provision would have limited awards to "prevailing" parties and parties who

"prevail in part". By rejecting the narrower provision, Congress evinced an intent to confer broad discretion to make or deny fee awards, even where the potential recipient did not "prevail in part". This choice was made on two separate occasions by different committees of different Congresses.

The significance of Congress' rejection of any "prevailing party" (or "prevailing in part") limitation is further emphasized by the broad interpretation which the phrase "prevailing party" had, by 1977, received in the courts. Petitioner concedes that the term had been construed by district courts to include parties who "prevail" by settlement rather than by litigated judgment, Pet. at 20 n.15, and that interpretation has been confirmed by this Court. *Maher* v. *Gagne*, 448 U.S. 122 (1980). The Petition does not refer to the fact that, in some cases, fee awards had been made prior to 1977 to parties who received little or none of the relief claimed, even under "prevailing party" standards. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Oregon 1969).[4] It

[4] In *Parham* plaintiff sought an award of back pay and injunctive relief for the class he represented on the basis of alleged discriminatory hiring practices. Although the court found that unlawful discriminatory practices had at one time existed, it denied injunctive relief due to good faith efforts by defendant to remedy the violation. Moreover, the claim for back pay was denied because the court found that plaintiff had not been denied employment on the basis of race. Although no relief was awarded, the court awarded fees on the basis that the lawsuit had acted as a catalyst to remedial action and plaintiff had performed a public service by establishing the Title VII violation.

In *Richards*, plaintiff claimed that she had unlawfully been denied a promotion on the basis of sex and sought an order requiring the promotion, back pay, and an injunction. The court found the denial to have violated 42 U.S.C. §2000e-2(a), but denied back pay and injunctive relief on the basis of defendant's good faith reliance on a state regulation. The court did not order a promotion since it found at the time of the decision plaintiff occupied the position she originally sought. After noting that the statute authorized a fee award to the "prevailing party" in the court's discretion, the court awarded plaintiff attorney fees of $250.

(footnote continues)

is unnecessary in the present case to resolve whether those cases properly interpret the "prevailing party" standard; since that standard is absent from the Clean Air Act its interpretation is not involved in this case.[5] The cases cited are indicative, however, of the broad interpretation given that standard. Hence, the fact that Congress consciously rejected any form of "prevailing party" limitation for the Clean Air Act, despite the

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(footnote continued)

As EPA points out, both *Parham* and *Richards* were mentioned by Senator Tunney following his statement that fee awards under the Toxic Substances Control Act, worded identically to section 307(f), are to be made "where such award is in the public interest without regard to the outcome of the litigation." 122 Cong. Rec. 8301 (1976). EPA contends that in all the cases cited by Senator Tunney, the plaintiffs prevailed in some sense or conferred a tangible benefit upon the class they represented. Pet. at 23 n.16. That analysis seems implausible in light of the facts of the cases. Moreover, even if it were so, petitioner ignores the fact that *Richards* and *Parham* were decided under "prevailing party" standards, and the other two cases, *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005 (2d. Cir. 1975) and *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) involved fee awards based not on statute, but on the traditional equitable basis that plaintiffs had conferred a "common benefit" on a class which they represented. Thus, although the prevailing party standard had been liberally construed, a finding of some degree of "success" was necessary for fees to be awarded in all four of those cases, in contrast to the approach suggested by Senator Tunney and taken under the Clean Air Act. In short, it is clear that Senator Tunney was not citing those cases as an indication of the outer limits of the courts' discretion, as petitioner contends, since they were decided under standards which required some degree of "success" and Senator Tunney was expressing the concept that fees could be awarded "without regard to the outcome of the litigation."

EPA also attaches great significance to Senator Tunney's statement that courts should adhere to existing case law, under which successful plaintiffs ordinarily should receive fee awards. Pet. at 23 n.16. Yet this merely suggests a presumption in favor of successful plaintiffs, not that courts may never award fees to non-prevailing plaintiffs.

[5] For the same reason, this case raises issues totally unlike those presented in *Hensley* v. *Eckerhart*, No. 81-1244 (U.S. Sup. Ct. *cert. granted* Mar. 1, 1982), which involves a "prevailing party" standard and the question raised is whether such a standard requires apportionment where fees are awarded to a party who only prevails in part.

expansive interpretation already given that term, indicates that Congress intended to confer broad authority on the courts to make discretionary fee awards.

Congress was also aware of the liberal interpretation which had been given section 304(d) of the Act, which authorizes fee awards in citizen suit enforcement actions under section 304 of the Act.[6] That provision was enacted in 1970 and is essentially identical to section 307(f). In 1977, the staff of the Senate Committee on Environment and Public Works compared the two Senate bills introduced in that year. With respect to S.252, the Report described the attorney fees provision which amended section 307, but which would have applied to "any judicial proceeding under this Act".[7] This was intended to include citizen suit enforcement litigation under section 304, as is confirmed by the Report's description of the proposal:

> This language covers instances when the Federal Government goes to court to enforce against a pollution source, when a pollution source goes to court to oppose a Federal action, and those instances in which a private citizen goes to court to require that the Federal Government, under the Citizen Suit provisions of the Clean Air Act, act against a pollution source or to enforce, requirements of the Act [sic].
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> Staff of the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 95th Cong., 1st Sess., A Section-by-Section Analysis of S.252 and S.253 Clean Air Act Amendments 37 (Comm. Print 1977), *reprinted in* Legislative History at 3893 (hereafter "Staff Report").

Thus S.252 would have imposed new restrictions on the fee award provision of section 304, which was originally enacted to authorize fee awards "in the public interest without regard to

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[6] See cases discussed in text, *infra*, at 19-21.

[7] See text quoted at 8-9, *supra*.

the outcome of the litigation."[8] In light of these proposed restrictions, the Report notes that one area of controversy related to the provision was:

> Is there any need to modify *the existing judicial practice of awarding fees based on the individual circumstances of each case?*
>
> *Id.*, at 37; Legislative History at 3893 (emphasis added).

The Senate Committee thus squarely faced the issue presented in this case: should the courts' discretion be limited to award fees only to parties who "prevailed in part," or should they be free to make awards, as they had been under section 304, to make awards "based on the individual circumstances of each case?" Clearly, when the Senate Committee chose the fee award provision of S.253, which was identical to the fee award provision under existing section 304(d), it chose to endorse the "existing judicial practice" of broadly discretionary fee awards and to extend it to section 307.

A further indication of congressional intent in rejecting any prevailing party limitation on fee awards is given by the House

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[8] S. Rep. No. 91-1196, 91st Congress, 2d Sess. at 65. Petitioner argues, in part, that section 304 was also intended to be limited to "successful" parties, Pet. at 16-20, largely ignoring the plain thrust of the quoted language, Pet. at 19 n.13, and arguing instead that another section of the report, which contemplates fee awards for parties who bring "legitimate" actions, does not clearly authorize a fee award in this case. Pet. at 18-19. EPA cites no authority for its conclusory statement that "legitimate" actions are limited to those which are "successful," *Id.*, which is contrary to the idea that fee awards are discretionary without regard to the outcome of the litigation. Moreover, as the Court of Appeals found, the expressions of legislative intent in the 1977 Amendments are clear, regardless of the intent with respect to the enactment of section 304 in 1970. 672 F.2d at 35 n.3; Pet. at 3a n.3. Although EPA suggests the Congress intended sections 304(d) and 307(f) to be equally narrow, Pet. at 22, when Congress enacted section 307(f) it considered 304(d) to be broad and intended section 307(f) to be equally broad. This is clear from the fact that Congress in 1977 rejected a version of section 307(f) which would have restricted discretion to award fees under section 304, as discussed in the text.

Report which accompanied the 1977 Amendments. That Report, relied on by the Court of Appeals, states:

> In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. *The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in NRDC v. EPA*, 484 F. 2d 1331, 1388 [sic; 1338] (1st Cir. 1973).
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> H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804 (1979) (emphasis added).

Petitioner suggests that this language is somehow consistent with its view that fee awards were limited by Congress to successful parties. Pet. at 24-25. Its argument fails to address the express rejection of any "prevailing party" restriction which, it concedes, had received a liberal construction by 1977. Pet. at 20 n.15. Moreover, EPA suggests that the thrust of the Report is limited by the case cited, *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) [hereinafter cited as *NRDC* v. *EPA*], for which EPA suggests a narrow interpretation. But Congress is obviously not bound by *stare decisis* and the citation to *NRDC* v. *EPA* in the House Report was an express adoption of the rationale of that case, not merely its precise holding. In that case, the court held that a fee award was "appropriate" under section 304 for a party which only partially prevailed. The court's reasoning, however, is far broader:

> We are not impressed by the government's argument that because some issues were decided

adversely to petitioners each party should bear its own costs. *The authorizing language of 304(d) permits an award "to any party, whenever the court determines such award is appropriate." This suggests greater latitude even than is found in 28 U.S.C. 2412, which authorizes awards to "the prevailing party." We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals.* When the government is attempting to carry out a program of such vast and unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the right to award costs and fees in favor of the EPA. *But the challenges here, even those not sustained, were mainly constructive and reasonable.* And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.

484 F.2d at 1338 (emphasis added).

This language indicates the court's view that the touchstone for fee awards under the Clean Air Act is "to encourage the achievement of statutory goals" and that awards may be made for unsuccessful challenges where they are "constructive and reasonable." Although petitioner would limit the House Report to the factual situation in *NRDC* v. *EPA*, in which NRDC

"prevailed in part," petitioner overlooks the fact that Congress consciously rejected precisely such a limitation on two occasions and opted for the broader provision ultimately enacted. In this context it is clear that the House Report adopted the rationale of the First Circuit's opinion and intended that the courts' discretion not be limited to "successful" parties.

EDF does not suggest that the Act confers unfettered discretion on the courts. Rather, EDF contends, and petitioner appears to concede, that the governing consideration is whether the litigation furthered the purposes of the Clean Air Act. Pet. at 9. The Court of Appeals adopted this approach, consistent with this Court's observation that the discretion conferred merely "entrust[s] the effectuation of the statutory policy to the discretion of the . . . courts." *Christiansburg Garment Co.* v. *EEOC, supra,* 434 U.S. at 416. Moreover, the principle that the court's discretion is to be guided by the goals of the Act in question is clearly enunciated in the legislative history of section 307 quoted above. Petitioner's disagreement with the Court of Appeals is essentially over the manner in which the court, in its discretion, applied this standard to the facts of this case.

Petitioner also suggests that the doctrine of sovereign immunity should have influenced the court's decision in this case. Pet. at 13-15. This contention misses the mark. Petitioner concedes that the legislative history of section 307 "clearly demonstrates that Congress meant to waive the government's traditional immunity and to overcome the presumption of the 'American Rule' against fee shifting." Pet. at 15. Nonetheless, petitioner suggests that certain special rules of construction should have governed the Court of Appeals' decision in this case. Pet. at 13-14. However, there is substantial support for the argument that once the government has unequivocably waived immunity from the suit, the only remaining issue is one of statutory construction. *Lehman* v. *Nakshian,* 453 U.S. 156,

171 (1981) (Brennan J., dissenting).[9] Moreover, even if the doctrine of sovereign immunity does require a conservative interpretation of statutory waivers, cases cited by petitioner indicate that the ultimate question is nonetheless one of congressional intent. For example, in *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court stated, in interpreting the statute of limitations under the Federal Tort Claims Act, that "we should not take it upon ourselves to extend the waiver beyond *that which Congress intended. . . . Neither, however, should we assume the authority to narrow the waiver that Congress intended.*" 444 U.S. at 117-118 (emphasis added, citations omitted). In *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), this Court also interpreted the Federal Tort Claims Act in light of the "broad and just purpose which the statute was designed to effect," 350 U.S. at 68, and stated:

> Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. *Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.*
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> 350 U.S. at 69 (emphasis added).

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[9] The *Lehman* case, upon which EPA relies, Pet. at 14 n.9, held that a plaintiff is not entitled to a jury trial in an action against the government under the Age Discrimination in Employment Act. The case is distinguishable from the present case since the statutory provision waiving sovereign immunity and authorizing actions against the government was silent regarding the right to jury trial, while the section providing a right of action against private employees was later amended to provide such a right expressly. Based on this fact, the Court concluded that it was "unnecessary to go beyond the language of the statute itself" to resolve the case. 453 U.S. at 165. Moreover, the Court found that the legislative history confirmed its reading. *Id.* at 165-68. Finally, in dictum, the majority suggested that even if the legislative history were ambiguous, plaintiff would not be entitled to a jury since sovereign immunity would require the right to a jury to be "affirmatively and unambiguously" stated. *Id.* at 168. In *Lehman*, the statutory language and legislative history gave a clear indication of legislative intent. In the present case, they "affirmatively and unambiguously" indicate that Congress intended to confer discretion on the courts without limiting that discretion to "prevailing" or "successful" parties.

In the present case, it is clear from the statutory language and the legislative history that Congress intended to confer broad discretion upon the courts to make fee awards, without restricting such awards to "prevailing" or "successful" parties. If sovereign immunity does require the application of certain rules of construction, those general rules are more than overcome by the clear showing of congressional intent in this case.

B. There is No Disagreement among the Federal Courts Concerning the Fee Award Provisions of the Clean Air Act.

Every federal court which has considered the issue has concluded that Congress did not intend to deny the courts the power to make fee awards to non-prevailing parties, in their discretion. These courts have concluded that the governing standard is whether the litigation furthered the goals of the Clean Air Act. As a result, the government's current interpretation lacks support in any case law.

Several decisions have considered the question of the proper interpretation of the fee award provisions of the Clean Air Act and reached the same conclusion as the Court of Appeal's decision herein. *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982); *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981); *NRDC v. EPA*, 484 F.2d 1331 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974); *Citizens Association of Georgetown* v. *Washington*, 383 F.Supp. 136 (D.D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976).

In the *Northern Plains Resource Council* case, the Ninth Circuit awarded fees to a petitioner which had unsuccessfully challenged EPA's issuance of a permit under the Clean Air Act.

In awarding fees under section 307 of the Act, the court stated the governing principle as follows:

> [I]n determining whether a party—prevailing or non-prevailing—can recover attorney's fees under § 307(f) from the Government, the test is "whether in light of what was known . . . when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorneys' fees."
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> 670 F.2d at 848 (citation omitted).

The Court concluded that an award of fees was appropriate because petitioner "brought this suit to promote the quality of air resources, and because the suit presented issues important to the construction of the Clean Air Act . . .." 670 F.2d at 849.

In *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co., supra,* the court considered an application for attorney fees by a citizens group which had challenged unsuccessfully the defendant's right to emit sulfur dioxide above certain levels. In concluding that an award of fees was inappropriate under section 304 of the Act, the court observed that a limitation of awards to a prevailing party was "notably missing" from the Act, but adopted the following approach in assessing the appropriateness of a fee award:

> The legislative history regarding Section 304 provides little guidance for determining when award of counsel fees is "appropriate." I think it is fair to conclude from the language chosen by Congress that *ultimate success in a citizen's suit was not intended to be a prerequisite to an award.* At the same time, however, in light of the absence of any more specific declaration of congressional intent, I believe that "appropriate" should be read in the context of the pre-existing notions about the circumstances under which one party may fairly be required to bear his adversary's costs of litigation. In this context it seems to this

> Court that success or failure must be given substantial weight and that an award of counsel fees to a losing party should be reserved for those cases in which either the litigation, though ultimately unsuccessful, *serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor.* The exercise of the *equitable judgment* thus called for must be made in light of all the actions of both parties during the course of litigation as well as during the relevant preceding period.
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> 62 F.R.D. at 355 (emphasis added, footnote omitted).

The court concluded that a fee award was not appropriate on the facts of the case because the suit had not induced the defendant to act in some way which benefitted the public, nor had it "in any other tangible or direct way contributed to achievement of the objectives of the Clean Air Act." 62 F.R.D. at 355. Such is not the case herein.

In *Citizens Association of Georgetown* v. *Washington, supra,* plaintiffs sought to prevent completion of two private construction projects on the Georgetown waterfront in an action brought under section 304 of the Act. Although plaintiffs were unsuccessful in their suit, the court concluded that the case was "an exceptional case" in which a fee award was appropriate. The court reviewed the statutory language and legislative history and reasoned that "success or failure on the merits has nothing to do with the trial court's *power* to award costs and attorneys' fees in citizen suits under the Clean Air Act." 383 F.Supp. at 144 (emphasis in original). Accordingly, the court concluded that "an award is appropriate if the suit has benefited the public interest as declared in the Clean Air Act." 383 F. Supp. at 144. The court further reasoned that "the advancement of an important legislative policy may justify the award of

costs and fees even where the plaintiff does not obtain the ultimate relief he seeks." 383 F.Supp. at 144.

Despite this unanimity of authority, petitioner argues that there is a "general presumption" against fee awards to "unsuccessful" litigants, Pet. at 14-15, but cites no support for that proposition. Indeed, the petitioner manufactures this "general presumption" out of whole cloth. Specifically, in the first sentence of this argument the Petition observes that attorney fees "generally are not available to parties who do not prevail on any claim." Pet. at 14. That statement is obviously true, since most fee award statutes are limited to "prevailing parties" and, even in cases where courts have the discretion to award fees to non-prevailing parties, such awards are highly unusual. But in the second sentence of the argument this bland generalization is elevated to the status of a "general rule." Pet. at 15. Finally, in the last sentence of the paragraph the "general rule" has become a "general presumption." *Id.* The only support cited for the existence of this "general presumption" is a statement in a lone dissenting opinion by Judge Wilkey in *Alabama Power* v. *Gorsuch*,[10] 672 F.2d at 13; Pet. at 14 n.10.

Based on this scanty support, and after conceding that section 307 was intended to waive sovereign immunity, petitioner proceeds to an astonishing statement: "Nothing in the language or legislative history of Section 307(f) suggests that attorneys' fees may be assessed against the government in favor of unsuccessful suitors." Pet. at 15. That statement totally ignores the plain thrust of the statutory language and the

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[10] *Alabama Power* was decided by the United States Court of Appeals for the District of Columbia Circuit, which chose to rule contrary to Judge Wilkey's views not only in *Alabama Power* itself, but also in that Court's decision in this case and in *EDF* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981), and *Montgomery Environmental Coalition* v. *Costle*, 646 F.2d 595 (D.C. Cir. 1981).

overwhelming evidence of the legislative history discussed above, all of which indicate that the courts may, in their discretion, award fees to non-prevailing parties against the government in an appropriate case. Specifically, it ignores evidence that: (1) Congress intended to put the government on an equal footing with private litigants under the Clean Air Act, Staff Report at 37, Legislative History at 3893; (2) Congress clearly intended to waive sovereign immunity and the presumption in favor of the "American Rule" in fee award litigation and, in the same Report, expressly rejected any limitation to "prevailing parties", H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* [1977] U.S. Code Cong. & Adm. News 1077, 1416; and (3) on two occasions, Congress consciously rejected a limitation of fee awards to only those parties who "prevail" or "prevail in part." (See text, *supra*, at 8-9.) Contrary to the petitioner's imagined "presumption," it is clear that, under section 307(f) of the Clean Air Act, Congress intended that the government, as well as private litigants, pay attorney fees when the courts in their discretion consider them justified.

C. Certiorari Is Inappropriate Because the Court of Appeals' Exercise of Discretion Turned On The Facts of The Case.

Since it is plain that the Court of Appeals had the power to make an award of fees herein, the only remaining issue is whether, on the facts of the case, the court abused its discretion in doing so. EDF contends that certiorari should not be granted to review such discretionary determinations based on a factual record.[11] As stated in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) this Court should "not grant a certiorari to review evidence and discuss specific facts." To conduct such

[11] As demonstrated in the following section, the Court of Appeals properly exercised its discretion and made a sound decision on the basis of the record before it. Moreover, even if this Court would have ruled differently on those facts in the first instance, EPA's Petition is not an appropriate vehicle for this Court to do so. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.")

a review in this case would require this Court to review an enormous record. Without such an analysis, this Court would be unable to assess the contribution made by EDF and Sierra Club to the objectives of the Clean Air Act. Since EPA concedes that an award of fees does not require success in the form of a court judgment, Pet. at 16, this Court would be required to weigh the significance of the effects of this litigation in other respects. These include the disclosures of factual information required of EPA at the behest of EDF, the changes in executive branch informal rulemaking procedures also resulting from EDF's participation in this case, and the degree of clarification of complex technical and legal issues addressed by the Sierra Club. Even if this Court, after reviewing the voluminous record, were to come to a conclusion different from that of the Court of Appeals, it seems unlikely that the ruling at the conclusion of such an undertaking would be of sufficient import to justify the effort.

II. THE COURT OF APPEALS' DECISION REPRESENTS A SOUND EXERCISE OF THE COURT'S DISCRETION UNDER THE CLEAN AIR ACT.

The petitioner appears to concede that the proper standard in determining fee awards under the Clean Air Act is whether the litigation substantially contributed to the goals of the Act. Pet. at 9. However, the Petition inaccurately suggests that the Court of Appeals reasoned that judicial interpretation of the statute was, in itself, a goal of the Act. *Id.* Finally, the Petition cryptically describes in two sentences the court's analysis of the manner in which the respondents furthered the goals of the Act in this case. Pet. at 7.

The Court of Appeals recognized that the litigation herein furthered the goals of the Act in several respects, each of which was identified by Congress in the legislative history. First, the House report which accompanied the 1977 amendments explicitly sought to "*encourage litigation* which will *assure proper implementation and administration of the act* or otherwise serve

the public interest." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804 (emphasis added); 672 F.2d at 41. Second, in assessing the meaning of the term "appropriate" the court considered the language of the First Circuit in *NRDC v. EPA*, supra, explicitly approved by the House Report, in which the court observed that "[t]he legislation is itself complex and novel. Given the implementation dates, *its early interpretation is desirable.*" Pet. at 5a; 484 F.2d at 1338 (emphasis added). By establishing the procedural requirements of section 307, on which EDF based its challenge, Congress also sought to restrain "broad administrative discretion . . . by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process." H.R. Rep. No. 95-294, *supra, reprinted in* [1977] U.S. Cong. & Admin. News 1077, 1398.

The Court of Appeals acknowledged the importance of these considerations in its ruling on a fee award and recognized that, although litigation is not an end in itself, Congress clearly and repeatedly emphasized the important role that litigation such as this should play in assuring the proper implementation of the Act.[12] In assessing whether an award was appropriate on the facts of this case, the court observed that this case represented the first interpretation of the new rulemaking procedures established by the 1977 amendments to the Clean Air Act. 672 F.2d at 41. In addition, the court considered the importance of

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[12] As the Second Circuit observed in *Friends of the Earth* v. *Carey*, 535 F.2d 165, 172-73 (1976), *cert. denied*, 434 U.S. 902 (1977):

> In enacting § 304 of the 1970 Amendments, Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests . . . .
>
> Thus the Act seeks to encourage citizen participation rather than to treat it as curiosity or a theoretical remedy . . . . As additional encouragement the Act expressly authorizes courts to award costs of litigation to any party when "appropriate," § 304(d).

the case (Pet. at 13a—15a), the technical complexities of the issues involved (Pet. at 17a), and the importance and difficulty of the legal issues presented (Pet. 17a - 18a). Petitioner ignores the fact that the Court of Appeals found that, in certain respects, both the Sierra Club and EDF were successful. With respect to the industry challenge to the EPA standard, which Sierra Club and EDF both opposed, the court noted:

> [T]he argument pressed most intensely by the utilities, that a 90% reduction in sulphur emissions was technologically unfeasible given the state of antipollution technnology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decisions on other parts.
>
> 672 F.2d at 41; Pet. at 17a.

The court further noted that:

> EDF's contribution involved factual research into meetings and communications between agency officials, White House personnel, members of Congress and industry representatives, as well as a legal analysis of the propriety of such meetings under the new section 307 and existing case law on *ex parte* contacts in rulemaking. Several documents pertaining to these contacts, proferred by EPA for the first time on appeal, were consulted by the court. . . . We note too that EDF's procedural challenges not only clarified how the new section 307(d) would operate, but apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings. *See* Stockman Memorandum For Heads of Executive Departments and Agencies. 2 (June 13, 1981).
>
> 672 F.2d at 41; Pet. at 18a (emphasis added).

Petitioner makes absolutely no mention of these aspects of the court's findings in characterizing the respondents as "totally unsuccessful" in this litigation.

Indeed, based upon the Court of Appeal's findings, it is apparent that this case meets the standards which petitioner would impose upon fee awards. Petitioner suggests, at various points, that, in order for the Court to be authorized to make a fee award, the recipient must have made some "tangible accomplishment," brought a "legitimate action" and been "successful" to some extent. Pet. at 16-18. Although the petition does not discuss it, the discovery revelations required of EPA as a result of the litigation indicate a "tangible accomplishment." In addition, the fact that informal rulemaking procedures for all executive branch agencies were changed to ensure compliance with the Court of Appeals ruling in this case indicates a substantial degree of "success." In fact, the Stockman Memorandum by itself rebuts the petitioner's suggestion that respondents were "totally unsuccessful" in this litigation. Moreover, the court's finding that respondents have engaged in good faith litigation of important and complex legal issues indicates that the action was "legitimate." Accordingly, even under the government's standard a fee award was within the ambit of the court's discretion in this case.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE RAISED WILL AFFECT FEW OTHER PARTIES OR CASES.

The petitioner raises a "floodgates of litigation" argument, suggesting that the decision below will give rise to what it considers unproductive litigation under the Clean Air Act and identically worded statutes. Pet. at 8-9 and 8 n.4. This argument lacks merit. As the petitioner's citations indicate, for the most part the statutes in question were enacted into law several years ago and, as discussed above, every federal court to consider them, has interpreted these statutory provisions in the same manner, i.e., as conferring broad discretionary authority

on the courts to make fee awards to litigants who further the purposes of the statute without regard to their success in the action. Moreover, as the Court of Appeals recognized in this case, it is extremely rare for a fee award to be made to a party who does not prevail. Although the courts have discretionary power to make such awards, in fact they rarely do so.

The only evidence which the petitioner cites as indicating the rising tide of litigation is a single pending case in which the Energy Action Educational Foundation "is now seeking attorneys' fees." Pet. at 8 n.4. In stark contrast to this lack of decided cases are the cases in which fees have been denied to non-prevailing parties and even, in some cases, to litigants who did prevail. *E.g., Consolidated Edison Co.* v. *Realty Investments Associates,* 524 F.Supp. 150 (S.D.N.Y. 1981) (fees denied prevailing defendant under section 304 of the Clean Air Act); *Carpenter* v. *Andrus,* 499 F. Supp. 976 (D. Del. 1980) (fees denied a prevailing plaintiff under the Endangered Species Act on ground that plaintiff's suit did not advance the statutory purposes); *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.,* 62 F.R.D. 353 (D. Del. 1974) (fees denied to non-profit citizens group which unsuccessfully challenged defendant's right to emit sulfur dioxide above certain levels).

In light of the rarity of fee awards to non-prevailing parties under the Clean Air Act and identical statutory provisions, the decision in this case will have little practical effect upon other cases or litigants. The court in this case did not apply a new standard, but rather applied the statutory interpretation which had been consistently expressed by other federal courts. What was unusual about this case was not the standard applied, but the factual circumstances which led the Court of Appeals to make an award of attorney fees. In this case, although the Court of Appeals awarded judgment to EPA, the guidelines it established as a direct result of EDF's challenge had a significant impact upon future implementation of the Act. Moreover,

EDF's challenge led the government to take the unusual step of adopting new procedural safeguards despite its success in court. Because the Court of Appeals based its decision on these limiting circumstances, it is unlikely that any future litigant who does not prevail will be awarded attorney fees *solely* on the basis of the volume of the record and the complexity of the issues. Accordingly, fee awards to non-prevailing parties should be as rare in the future as they have been in the past. As a result, the decision of the Court of Appeals will have little practical effect on most litigation under the statutes involved and certiorari should be denied.

CONCLUSION

It is a matter of record that the government's opposition to an award of attorney fees to EDF and Sierra Club in this case was the result of a change of administration policy concerning fee awards to non-prevailing parties.[13] 672 F.2d at 34, 41; ____ F.2d at ____; Pet. at 2a, 19a, 24a. In this context, it is not surprising that petitioner is unable to cite any authority, either in case law or legislative history, which directly supports or expresses its interpretation of the applicable statutory provision. Instead, the petitioner relies upon a dissenting opinion for direct support (Pet. at 14 n.10, 19), "notions" concerning fee awards (Pet. at 8), unsupported assertions of what it feels is "surely" or "clearly" the case (Pet. at 9, 10), its view of what litigants "should" expect (Pet. at 12), and "the spirit" of a decision of this Court involving standing under the First Amendment (Pet. at 11 n.6). The lack of authority directly supporting the petitioner strongly suggests that its position is not an indication of what the law is, but merely what petitioner would like it to be. Although a change in policy may alter the government's

[13] Prior to the change of policy, the administrative interpretation of the statute was consistent with the position taken by respondents herein. Accordingly the Court of Appeals' decision did not disturb any long-standing administrative interpretation of the law.

tactics in litigation, it cannot alter the legislative determinations which govern this case.

The fee awards involved in this case have now been in litigation for more than a year and a half. The issues raised herein do not involve difficult or unresolved questions of statutory construction, as indicated by the unanimity of interpretation by the federal courts which have addressed the subject. Further review of this case will only delay unnecessarily payment of the fees to which respondents are entitled.

For the reasons set forth above, respondent Environmental Defense Fund urges this court to deny the Petition for Certiorari.

Respectfully submitted,

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September 27, 1982

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

Washington, D.C. 20503

June 11, 1981

Embargoed for Release:
6:00 p.m. E.D.T.
June 13, 1981

M-81-9

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DAVID A. STOCKMAN
DIRECTOR

SUBJECT: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward

this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle,* No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)

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No. 82-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

VS.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND,
Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This supplemental brief is submitted by respondent Environmental Defense Fund (EDF) pursuant to Rule 22.6 of this Court in order to bring to the attention of the Court a decision which was not available at the time EDF filed its Brief in Opposition to Petition for Writ of Certiorari[1] and which further undermines the position taken by the petitioner EPA in this litigation. In its October 1, 1982, decision in *Village of Kaktovik* v. *Watt*, Nos. 81-1752, -1753 and -1774 (D.C. Cir., filed Oct. 1, 1982), the Court of Appeals for the District of Columbia Circuit reversed an award of attorney fees under the

[1] Hereafter "Brief in Opposition."

Outer Continental Shelf Lands Act (OCSLA)[2] and the Endangered Species Act (ESA)[3], each of which contains a fee award provision worded identically to the Clean Air Act provision involved in this case. (Fifteen copies of the full opinion of the Court have been lodged with the Clerk with the filing of this Supplemental Brief.) The opinion for the Court of Appeals was written by Judge Wilkey, whose dissent in *Alabama Power* v. *Gorsuch*, 672 F.2d 1, 13 (1982), provided the *only* support for EPA's contention in this case that there is a general presumption against fee awards to parties who do not prevail on any claim. See Petition at 14. Although the court denied fees in the *Village of Kaktovik* case, Judge Wilkey took pains to point out that even though plaintiffs "ultimately lost on all issues . . . this need not bar the award of attorneys' fees and costs . . . ." (Slip Op. at 3.) In addition, Judge Wilkey distinguished the present case from *Village of Kaktovik* and, in doing so, he tacitly approved the Court of Appeals decision in this case and supported many of the arguments advanced herein by EDF and the Sierra Club.

Specifically, the court in *Village of Kaktovik:*

(1) pointed out that in this case the fee applicants' litigation was found to be "exceptional" and a "substantial contribution to the statutory goals," (Slip Op. at 4);

(2) emphasized the importance of this case in that it involved "national pollution standards" with "critical implications" for the environment, human health, and the economy (Slip Op. at 9);

(3) noted that this case was "decidedly of first impression" and that the complexity of the issues required the court in this case to issue a 122-page opinion to resolve them (Slip Op. at 10); and

(4) as if in response to the "floodgates of litigation" argument advanced by EPA in this case, pointed out that the award of fees required a "substantial" or even "ex-

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[2] 43 U.S.C. §§ 1331-56, 1801-02, 1811-24, 1841-47, 1861-66 (1976 & Supp. IV 1980).

[3] 16 U.S.C. §§ 1531-42 (1976 & Supp. IV 1980).

ceptional" contribution to the goals of the statute and, accordingly, that fee awards to non-prevailing parties would be limited to exceptional cases (Slip Op. at 12-13).

Since Judge Wilkey's previous opinion provided the only support for a central point in EPA's argument, the *Village of Kaktovik* case clearly underscores the lack of authority underlying EPA's position.

For the reasons previously set forth in EDF's Brief in Opposition and the reasons set forth in the *Village of Kaktovik* case, EDF urges this Court to deny the EPA Petition.

Respectfully submitted,

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ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Both respondents urge the Court to deny the petition because this case purportedly involves no more than a fact-bound exercise of discretion by the court of appeals that, they claim, was fully consistent with congressional intent, and because the decision below allegedly follows other lower court rulings on the same question. Neither contention is correct.

1. To be sure, Section 307(f) of the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. IV) 7607(f), confers discretion on the courts of appeals to decide when attorneys' fee awards are "appropriate." But the question presented by the petition is not simply whether the court below abused that discretion in this case. Instead, the fundamental issue we have tendered—which is one of law rather than fact—is whether Congress intended the courts *ever* to have discretion to award fees to totally unsuccessful parties.

Contrary to respondents' suggestions, the size or complexity of the case has no bearing on this question. EDF Br. in Opp. 1-2; S.C. Br. in Opp. 1.[1] Nor is it necessary to sift through the voluminous record in this case because respondents concede that the EPA actions they challenged were upheld in every respect. EDF Br. in Opp. 3; S.C. Br. in Opp. 2. Thus, the Court need only determine whether, as a matter of law, the discretion conferred by Congress encompasses fee awards to totally unsuccessful litigants.[2]

Respondents argue that the lower court's interpretation of Section 307(f) is supported, if not compelled, by the legislative history of that provision. But the legislative history does not go so far, and when viewed under the rules of strict construction that govern waivers of sovereign immunity, this history cannot support the award of fees to totally unsuccessful parties.

a. It is well established that waivers of sovereign immunity must be "unequivocally expressed." *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981), quoting *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Respondents do not dispute this doctrine. Rather, they note that this Court has refused to infer immunity where Congress intended to waive it. EDF Br. in Opp. 17. Congressional intent, they argue, is the central inquiry (*ibid.*). But this aphorism does not relax the standard for determining congressional intent or measuring its scope. Congress' intent to waive sovereign immunity must be "affirmatively and unambiguously"

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[1]The Brief in Opposition filed by the Environmental Defense Fund will be cited as "EDF Br. in Opp." and that filed by the Sierra Club will be cited as "S.C. Br. in Opp."

[2]Apparently recognizing that fee awards to totally unsuccessful parties are difficult to justify as "appropriate," respondents have manufactured various "public benefits" allegedly attributable to their lawsuits. Even a cursory examination of these "benefits," however, shows them to be illusory. See pages 7-9, *infra*.

stated, *Lehman* v. *Nakshian, supra,* 453 U.S. at 168, and the waiver must be "construed strictly in favor of the sovereign." *McMahon* v. *United States,* 342 U.S. 25, 27 (1951). Applying these standards to the evidence of congressional intent relied on by respondents, it cannot be concluded that Congress "unequivocally expressed" an intent to authorize attorneys' fees to parties who did not succeed in any tangible manner.

b. Respondents emphasize that Congress rejected a proposal providing that attorneys' fees "shall" be awarded to any party that "prevails" and "may" be awarded to any party that "prevails in part." EDF Br. in Opp. 8-9. But this proposal may have been rejected because it inflexibly required an award to a prevailing party, regardless whether that party had furthered or frustrated the goals of the Act.[3] Rejection of the proposal thus sheds little light on the proper interpretation of the provision ultimately adopted.[4]

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[3]See, e.g., *Carpenter* v. *Andrus,* 499 F. Supp. 976, 979 (D. Del. 1980) (denying attorneys' fees to a successful plaintiff under the Endangered Species Act of 1973's "whenever * * * appropriate" provision, 16 U.S.C. 1540(g)(4), because the suit failed to "advance the statutory purpose").

[4]EDF emphasizes, however, that in choosing between the two versions, Congress expressly considered whether there was "any need to modify the existing judicial practice of awarding fees based on the individual circumstances of each case." EDF Br. in Opp. 13. This consideration, however, says nothing about an intent to award fees to parties that do not succeed in any respect. For, when Congress purportedly endorsed the "existing judicial practice," no court had ever awarded fees to such a party. As explained, *infra,* at pages 4-5, attorneys' fees had only been awarded under Section 304(d) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d), to parties that had in some tangible way furthered implementation of the statute. Indeed, the courts had expressly refused to award fees to parties that had not achieved any such success. *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.,* 62 F.R.D. 353 (D. Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975).

EDF also relies on language from the House Report, quoted in our petition at page 24, that rejected a "prevailing party" standard. From this passage, read in conjunction with *NRDC* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973), EDF concludes that Congress intended to allow the award of fees to a party who was not successful in any way, so long as the lawsuit was "constructive and reasonable." EDF Br. in Opp. 14-15

Congress' rejection of a "prevailing party" standard, however, cannot be so broadly construed. The "prevailing party" standard is a term of art, and in 1970, when Congress authorized fees "whenever appropriate" under Section 304(d) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d), the "prevailing party" standard required that fees be denied to any party that had not actually prevailed in final judgment. Pet. 20 n.15. Even by 1977, when Congress amended Section 307 to parallel Section 304, the "prevailing party" standard still required a party to prevail formally, either through settlement or litigated judgment. Thus, for example, in the cases cited by EDF, fees were awarded on the explicit grounds that the plaintiffs had actually prevailed on the legal merits of their claims, although the courts concluded that the relief requested was no longer necessary.[5] And even in decisions involving settlements rather than litigated judgments, fees were allowed only where the plaintiff actually established liability. See *Williams* v. *General Food Corp.*, 492 F.2d 399, 408 (7th Cir. 1974). Thus,

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[5]In *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 430 (8th Cir. 1970), the court specifically held that: "[h]aving prevailed in his contentions of racial discrimination * * * Parham is entitled to reasonable attorney's fees * * *." In *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 340-341 (D. Or. 1969), the district court held that Richards had established a violation of the statute, and thus had formally prevailed. The relief sought was not granted because it had already been obtained by the defendant.

Congress's rejection of a "prevailing party" test does not demonstrate congressional intent to allow attorneys' fees to parties that were not successful in any way.

This conclusion is not altered by the 1977 House Committee's reliance on *NRDC* v. *EPA*. In *NRDC* v. *EPA*, the First Circuit found that Congress authorized attorneys' fees "whenever appropriate" in order "to encourage the achievement of statutory goals." 484 F.2d at 1338. In awarding fees to NRDC, the court noted that NRDC's challenges, "even those not sustained, were mainly constructive and reasonable" (*ibid.*). Seizing on the court's observation that NRDC's challenges were "constructive and reasonable," EDF argues that no more is required: a party is entitled to attorneys' fees if its arguments are "constructive and reasonable," even if it is not successful in any respect. EDF Br. in Opp. 15. EDF ignores the fact that NRDC prevailed on most of its claims. Thus, it is not clear that the First Circuit's reasoning supports EDF's expansive interpretation of the "whenever appropriate" standard; nor is there reason to believe that such an interpretation was endorsed by Congress. As EDF appears to concede, *NRDC* v. *EPA* provided for the award of attorneys' fees "to encourage the achievement of statutory goals." EDF Br. in Opp. 15. In adopting the "whenever appropriate" standard for Section 307, therefore, Congress was simply rejecting the technical and formalistic requirements of the "prevailing party" standard in favor of a more direct concern for the goals of the statute.

Thus, the courts do have discretion to award fees if the plaintiffs have " 'substantially contributed' to the goals of the Clean Air Act" (Pet. App. 20a n.10), even though they did not technically "prevail." But this standard clearly entails some element of success, some tangible contribution that alters the course of EPA implementation of the Clean Air Act, thereby furthering the goals of the statute. In this

case, the court awarded fees for mere participation in judicial review. While such participation may have value, it does not necessarily further any goal of the Clean Air Act.[6] And neither respondent has offered any evidence that mere litigation was within the scope of the goals that Congress intended to further through the award of fees.[7]

c. Sierra Club contends that the court of appeals' interpretation of Section 307 is reinforced by recent congressional action.[8] S.C. Br. in Opp. 8-9. In a mark-up session on a bill to amend the Clean Air Act, the Senate Committee on Environment and Public Works adopted a proposal by Senator Simpson allowing fee awards only to prevailing parties. S.C. Br. in Opp. App. 1-4. Sierra Club argues that, by this action, the Senate Committee implicitly confirmed the court of appeals' interpretation of the existing statute. The amendment, however, can as easily be read as emphatic repudiation of the court of appeals' decision. And, indeed, when he first introduced the proposal, Senator Simpson

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[6]Participation in the rulemaking process may help to ensure that the Administrator's decision is based upon a full exposition of the facts, and thus may further the goals of the statute. Participation in a totally unsuccessful judicial challenge to that decision, however, makes no discernible contribution to the goals of the statute, since it has no effect on the Agency's implementation of the statute.

[7]Indeed, when Congress intended to fund participation for its own sake, it has done so explicitly. See Pet. 27 n.18. Thus, for example, Congress has expressly authorized EPA to award attorneys' fees for participation in rulemakings under the Toxic Substances Control Act, 15 U.S.C. 2605(c)(4)(A). Such funding is rare, however, and it can hardly be inferred that, by providing for attorneys' fees "whenever appropriate," Congress intended, sub silentio, to extend such extraordinary benefits to unsuccessful litigants. Certainly, such an intent has not been "unequivocally expressed."

[8]The speculative possibility that such legislation might be enacted should not deter the Court from considering the important question presented by this case. See *Bryant* v. *Yellen*, 447 U.S. 352, 380 n.32 (1980).

indicated that the court of appeals' decision was contrary to Congress' "original intent."[9] Thus, the committee's action is of no help to respondents.

2. Recognizing their total lack of success on the merits, respondents nevertheless find "public benefits" from this litigation because, in affirming EPA's implementation of the statute, the court articulated procedures for the use of computer models (S.C. Br. in Opp. 2) and for receipt of oral communications after the comment period has closed (EDF Br. in Opp. 2-3). Respondents do not emphasize the fact that the court of appeals explicitly found that EPA was already implementing these procedures (*Sierra Club* v. *Costle*, 657 F.2d 298, 332-345, 400-410 (D.C. Cir. 1981)). Judicial articulation of these rules is therefore of little more than scholarly interest. Certainly, it does not in any sense further the goals of the Clean Air Act.

While conceding that EPA had complied with all of these procedures in implementing the Clean Air Act, EDF asserts that it is entitled to attorneys' fees because the court of appeals' decision caused the Office of Management and Budget to "alter" procedures for rulemaking in the entire

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[9]In the mark-up session on July 27, 1982, Senator Simpson described his proposal as follows:

> Senator Simpson: * * * And then, Mr. Chairman, there were two other items, and I will certainly submit those to the committee. Each of them were [*sic*] something I have discussed before. One was the venue amendment, and that is probably on the list. Another was one attorneys' fees for prevailing parties. That was the original intent and now we have seen several instances where there have been attorneys' fees granted to nonprevailing parties, and that was another area. * * *"

Mark-Up Session on the Clean Air Act Amendments of 1982: Hearings Before the Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess. 6 (1982). (Stenographic Transcript of Milton Reporting, Inc., Washington, D.C.).

Executive Branch.[10] EDF Br. in Opp. 3. This bold claim is based entirely on a memorandum of David Stockman, dated June 11, 1981. EDF Br. in Opp. 1a-2a. The memorandum outlines the roles of the Presidential Task Force on Regulatory Relief and the Office of Management and Budget in agency rulemakings. As EDF points out, the memorandum explains that the procedures therein described will be consistent with the court of appeals' decision in this case. There is no indication anywhere in the memorandum, however, that that decision in any way "altered" the procedures previously employed. And, considering that the court below found that EPA and OMB were already complying with these requirements, there is no reason to believe that any change was effected by this memorandum.

Respondents lastly justify the fee awards by asserting that the litigation benefited EPA. Sierra Club suggests that, while the court concluded that EPA's rulemaking had fulfilled the requirements of the Clean Air Act, Sierra Club " 'aided agency implementation' " of that statute "by instructing EPA on a better (albeit not mandatory) way of conduct rule-makings * * * ." S.C. Br. in Opp. 2. No attempt is made to argue that Congress intended to award attorneys' fees to anyone undertaking such admittedly superfluous instruction.

Both respondents also rely on the court's finding that they had "effectively supplemented" EPA's defense of its regulations against industry challengers. Pet. App. 7a n.5; S.C. Br. in Opp. 3; EDF Br. in Opp. 4. But it was Congress's clear intent that EPA and the Department of Justice should

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[10]EDF also claims that it was "successful" in requiring EPA to divulge factual information relating to the allegedly improper ex parte contacts. EDF Br. in Opp. 5. Since, upon examination by the court of appeals, this information only confirmed the propriety of the Agency's actions, any claim of "success" on this account borders on the frivolous.

defend the regulations promulgated under the Clean Air Act. It is incongruous to assume that Congress also intended to award attorneys' fees to litigants who take it upon themselves to supplement that effort.

3. Both respondents argue that the decision below is consistent with every other federal court decision on the same question. EDF Br. in Opp. 18; S.C. Br. in Opp. 10. The fact is, however, that the cases cited by respondents simply did not involve the question presented here.[11]

In *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), the court *declined* to award fees to an unsuccessful litigant. Although the court observed in dicta that "ultimate success" in a citizen's suit under Section 304 of the Clean Air Act might not be a prerequisite to an attorneys' fee award (62 F.R.D. at 355), the court also stated that fee awards to a losing party should be reserved for those cases in which the litigation "serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor" (*ibid.*). This hardly constitutes an endorsement of fee awards to parties whose "contribution" to the goals of the statute was an unnecessary validation of the Agency's actions. Indeed, elsewhere in the opinion the court questioned whether fees would be "appropriate" when, as here, state or federal pollution control agencies are already actively engaged in fulfilling their statutory duties (*id.* at 357).

Respondents also cite the district court's decision in *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D. D.C. 1974), rev'd, 535 F. 2d 1318 (D.C. Cir. 1976). That decision, of course, is of no precedential value

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[11]The only exception is *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982). That decision, like the one below, was wrongly decided. The decision, moreover, is not final because the Ninth Circuit has not yet fixed the amount of the award.

in light of the court of appeals' ruling that the district court had no jurisdiction to award attorneys' fees. But even the district court's reasoning on the merits shows that plaintiffs in that case accomplished far more than the airing of novel issues. The court made it clear that plaintiffs lost their case to enjoin construction of two buildings primarily because the District of Columbia government had failed to enact the regulatory framework contemplated by the Clean Air Act. 383 F. Supp. at 145. The court thus saw the suit as a helpful and necessary effort to galvanize the District to action. *Id.* at 145-146. By contrast, the court of appeals in the present case found that EPA had already acted properly.

Respondents also contend that the First Circuit's decision in *NRDC* v. *EPA*, 484 F.2d 1331 (1973), sanctions fee awards to losing parties. As we have already explained in our petition, however, NRDC was *successful* in several major respects (see 484 F.2d at 1338), and thus the case did not raise the question presented here. The same is true of *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), relied upon by EDF (Br. in Opp. 18).

Finally, we have already addressed the decision in *Metropolitan Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981). Pet. 19 n.13. As previously noted, the District of Columbia was indisputably in violation of the Clean Air Act when the lawsuit was filed; only a change in the law some three years later prevented plaintiffs from securing a favorable final judgment. This anomalous situation cannot qualify as support for the decision below.

The court of appeals' decision thus represents an unwarranted expansion of litigants' rights to collect attorneys' fees from the government. By rewarding unsuccessful challenges to EPA's implementation of the Clean Air Act, the court has divorced the attorneys' fee provision from any discernible congressional goals, for the sake of subsidizing assistance in the mere "refinement of jurisprudential understanding." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, No. 80-327 (Jan. 12, 1982), slip op. 8.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

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No. 82-242

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether it was "appropriate," within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), to award over $90,000 in attorneys' fees and costs to parties who failed to prevail on any aspect of their challenge to rulemaking action taken by the Administrator of the Environmental Protection Agency.*

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* The parties involved in the litigation concerning attorneys' fees are solely those appearing in the caption of the case in this Court. This case began, however, as eight consolidated petitions for review under the Clean Air Act. At that stage of the proceedings, the litigants included a large number of other parties, mostly electric utilities, whose names are collected in Appendix D to the petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-242

ANNE M. GORSUCH, ADMINISTRATOR,
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v.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) holding the Administrator liable for attorneys' fees and costs is reported at 672 F.2d 33. The opinion of the court of appeals (Pet. App. 23a-38a) determining the amount of attorneys' fees and costs to be awarded respondents is reported at 684 F.2d 972.

JURISDICTION

The judgment order of the court of appeals (Pet. App. 39a-40a) was entered on July 16, 1982. The petition was filed on August 11, 1982, and granted on October 18, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), provides in pertinent part as follows:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

STATEMENT

Following a totally unsuccessful challenge to regulations promulgated by the Environmental Protection Agency (EPA), respondents Sierra Club and Environmental Defense Fund (EDF) sought an award of attorneys' fees and costs against the government under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). Notwithstanding respondents' failure to prevail on a single issue, the court of appeals ruled that they were entitled to fees and costs. Before discussing the court's ruling on attorneys' fees, we briefly describe the underlying merits litigation.

1. Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, requires EPA to set performance standards limiting emissions from new or modified air pollution sources that reasonably may be anticipated to endanger public health or welfare. In 1979, EPA promulgated revised new source performance standards for coal-fired generators capable of firing more than 250 million British thermal units (MBtu) per hour.[1] The performance standard limited sulfur

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[1] A complete history of the rulemaking is set forth in the court of appeals' merits opinion, *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981), and need not be repeated here. As

dioxide (SO_2) emissions to a maximum of 1.2 pounds per MBtu. In addition, powerplants with potential, i.e., uncontrolled, SO_2 emissions of greater than 0.60 pounds per MBtu were required to reduce such emissions by 90%; powerplants with potential emissions of less than 0.60 pounds of SO_2 per MBtu were required to reduce them by no less than 70%.

The Sierra Club, EDF, and industry organizations filed petitions in the United States Court of Appeals for the District of Columbia Circuit for review of the new source performance standards.[2] Sierra Club challenged EPA's action on three grounds: (1) that EPA lacked statutory authority to adopt a "variable" standard for SO_2 emissions, i.e., a standard that allowed percentage reductions in emissions ranging from 70% to 90% (*Sierra Club* v. *Costle*, 657 F.2d 298, 316 (D.C. Cir. 1981); (2) that EPA's standard was not supported by the rulemaking record (*id.* at 316-317); and (3) that EPA failed adequately to apprise the public of its intention to adopt a variable reduction strategy, thereby depriving the public of a fair opportunity to comment on the adoption of a

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described by the court of appeals, the final new source performance standards regulated emissions of sulfur dioxide, particulate matter, and nitrogen oxides. Respondents, however, challenged only certain features of the sulfur dioxide standard. Accordingly, we confine our description of the merits litigation to that aspect of the new source performance standards.

[2] Jurisdiction in the court of appeals was properly predicated on Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1), which provides that judicial review of many of the Administrator's actions, including the promulgation of new source performance standards, may be had only in the United States Court of Appeals for the District of Columbia Circuit.

variable standard in the final rule (*id.* at 317-318). EDF challenged the performance standards on only one ground—the alleged procedural impropriety of "ex parte contacts." EDF asserted that a more stringent ceiling was attainable and would have been adopted but for an "ex parte blitz" on EPA after the close of the comment period, during which EPA was pressured not to adopt a more stringent standard (*id.* at 386).

On April 29, 1981, the court of appeals rendered its decision on the merits. *Sierra Club* v. *Costle*, *supra*, 657 F.2d 298, 298. The court rejected all of Sierra Club's claims. First, it concluded that EPA had ample statutory authority to adopt a variable standard (657 F.2d at 318-322). Second, it rejected Sierra Club's charge that the variable standard was without basis in the record. After reviewing the technical background for the standard, the factors considered by EPA in adopting the standard, and examining the Agency's stated rationale, the court held that EPA's action was reasonable (*id.* at 322-352). Finally, the court rebuffed Sierra Club's claim that EPA's adoption of a variable standard was procedurally defective. The court found that the public in general and Sierra Club in particular had fair notice of and opportunity to comment on the Agency's intention to adopt a variable standard (*id.* at 353-356).

EDF fared no better on its claim. The court separated the allegedly improper ex parte contacts into two categories for analytical purposes: (1) written comments submitted after the close of the comment period; and (2) meetings after the close of the comment period with the President and heads of other Executive Branch agencies, congressional representatives, and private parties (657 F.2d at 386-387).

With respect to written comments received after the close of the comment period, the court held that nothing on the face of the Clean Air Act prohibited the Agency from receiving and considering such materials as long as they were placed in the Agency's rulemaking docket, and that all such materials had in fact been properly docketed in this case (*id.* at 397-400).

With respect to the meetings, the court again noted that they were not prohibited by the Act; indeed, the court thought that such meetings were desirable given the importance of openness and accessibility on the part of public officials (657 F.2d at 400-401). The court further noted that summaries of seven of the nine contested meetings had been placed in the rulemaking docket, and held that this fully satisfied all statutory and due process requirements (*id.* at 386-410). A summary of one of the remaining two meetings was omitted from the docket through inadvertence. The court found that this was an honest error and that, in any event, the particular meeting was not of the type required to be entered on the rulemaking docket (*id.* at 404). The final meeting included the President and members of the White House staff. The court expressly recognized the President's constitutional authority to control and supervise executive policymaking and was hesitant to fashion any new rule that would impair the President's ability to fulfill this role (*id.* at 405-407). In this particular instance, the court found that because EPA did not base the rule on any information or data arising from the meeting, there was no justification for requiring it to be docketed on the rulemaking record (*id.* at 407).

Finally, the court noted that it could find no evidence of impermissible congressional pressure on EPA arising out of two meetings (both entered on the rulemaking docket) that the Administrator had with West Virginia Senator Robert Byrd. EDF's claim was rejected because it failed to present any evidence that Senator Byrd had sought to influence the rulemaking by injecting extraneous considerations into the Agency's decisionmaking processes (657 F.2d at 408-410).

2. After losing every issue on the merits, Sierra Club and EDF, relying on Section 307(f) of the Clean Air Act, filed motions seeking awards of attorneys' fees and costs. Although settlement discussions were initiated between respondents and the Justice Department lawyer then assigned to the litigation, no agreement was ever consummated because the Assistant Attorney General in charge of the matter declined to approve settlement. Thereafter, the fee requests were fully briefed by respondents and the government. Sierra Club and EDF both argued that an award of fees and costs was "appropriate" because they had conferred certain "public benefits" by bringing their unsuccessful lawsuits. Specifically, they contended that they had advanced the purposes of the Clean Air Act by enabling the court of appeals to construe the provisions of Section 111 of the Act, thus providing future guidance to EPA and the public as to how that provision should be interpreted and implemented. EDF also argued separately that litigation of the ex parte contacts issue had clarified the "rules of the game" as to contacts with Agency officials during informal rulemakings. The government opposed any fee award whatsoever because respondents had not only lost the litigation but failed to advance the purposes of the Clean Air Act in any concrete or tangible fashion.

On February 5, 1982, the court of appeals issued an opinion rejecting all the government's arguments in opposition to the motions for fees (Pet. App. 1a-20a).[3] After examining the text of Section 307(f) and its legislative history, the court concluded that an award of fees was "appropriate" where the party seeking fees had " 'substantially contributed' " to the goals of the Clean Air Act" (Pet. App. 20a n.10), whether or not the litigation was actually successful. The court further concluded that the "express" goals of the Clean Air Act included "prompt resolution of serious questions of statutory interpretation" (*id.* at 18a). A litigant could satisfy this goal, the court ruled, by making "exemplary" presentations on "important, complex and novel" issues (*id.* at 12a-13a; 18a-19a).

The court then suggested that the parties resume their negotiations over the proper amount of fees to be awarded, and ordered a status report on the negotiations within three months. In May 1982, the parties advised the court that their negotiations had been unsuccessful. Thereafter, Sierra Club and EDF filed amended fee requests encompassing their work on the

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[3] Actually, the court issued its opinion on January 22, 1982. That opinion was later withdrawn and a substitute opinion issued on February 5, 1982. On the same day, the court issued attorneys' fee decisions in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006, and *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), petition for rehearing pending, No. 79-1580. The principal differences between the January and February opinions were that the February 5 opinion *added* a footnote responding to Judge Wilkey's dissent in *Alabama Power Co., supra*, 672 F.2d at 8-33, and *deleted* a passage cautioning that the amount of an award to "self-appointed representatives of the public interest" should be closely scrutinized.

case-in-chief and on the attorneys' fee dispute. On July 16, 1982, the court of appeals issued its final opinion (Pet. App. 23a-38a), in which a majority of the panel determined that Sierra Club was entitled to an award of $44,715 in fees and $644.60 in expenses, and that EDF was entitled to an award of $45,874.80 in fees. Although the court made modest reductions in the number of compensable hours claimed by respondents, the majority awarded fees at the hourly rates respondents had requested and rejected the government's argument that the awards should be reduced to reflect respondents' total lack of success on the merits (Pet. App. 26a-30a, 32a-35a). The majority stated that any such reduction could not be squared with "the Clean Air Act's overriding purpose of encouraging constructive legal challenges * * *" (*id.* at 30a). The court did, however, agree with the government that because of their failure to prevail respondents were not entitled to any "bonus" in addition to their "lodestar" fees (determined by multiplying the hours reasonably expended by a reasonable hourly rate) (*id.* at 30a-31a). Judge Robb dissented in part, asserting that a reduction in respondents' lodestar fees was "appropriate" because respondents had "batted zero" and "[i]f counsel were private practitioners their clients might well complain that they could have lost the case for less money" (*id.* at 36a-37a).

SUMMARY OF ARGUMENT

1. By awarding attorneys' fees to parties who succeeded only in "airing" issues that EPA had already properly resolved, the court of appeals' decision represents an unprecedented departure from the well-established American Rule against fee-shifting and

extends far beyond any of the recognized equitable or statutory exceptions to that rule. When examined in light of Congress' customary practices with respect to attorneys' fees, it is clear that Section 307(f) does not, on its face, contain the requisite waiver of sovereign immunity required to support a fee award to totally unsuccessful litigants. For this reason alone, the court's interpretation of the statute must be reversed.

2. Moreover, examination of the legislative history only confirms that the court of appeals has far exceeded the limited waiver of sovereign immunity intended by Congress. The statutory provision at issue in this case, enacted in 1977 as Section 307(f) of the Clean Air Act (42 U.S.C. (Supp. IV) 7607), is modeled on the identical provision contained in Section 304(d) of the 1970 Clean Air Act, now recodified at 42 U.S.C. (Supp. IV) 7604(d). The legislative history of that section reveals that Congress authorized courts to award attorneys' fees when "appropriate" so that fees would be available to a plaintiff who succeeded in correcting a violation of the Act but did not obtain a final judgment. Because the then-existing caselaw interpreting "prevailing party" attorneys' fee provisions would not have permitted an award in such circumstances, Congress found it necessary to substitute the "appropriate" standard for the more customary "prevailing party" terminology. But nothing in the legislative history of the 1970 Act indicates that Congress anticipated or intended that fees would be available to parties that were not successful in any way.

In 1977, Congress added the "appropriate" attorneys' fee standard to Section 307 simply to bring that section into harmony with Section 304. But, notwithstanding Congress' obvious desire for uniformity, the

court of appeals concluded that Congress in 1977 intended to adopt the "far broader policy" (Pet. App. 4a-5a n.3) of rewarding substantial contributions to the goals of the statute, without regard to whether the litigation was in any way successful. The court's conclusion thus has the anomalous effect of creating two entirely different standards for attorneys' fee awards in the same statute, even though the language of the two provisions is identical. Equally important, the evidence cited by the court of appeals for its novel conclusion can hardly be characterized as "unequivocal." Instead, the court's decision rests entirely on a strained reading of ambiguous legislative history that is plainly insufficient to support the novel result reached.

3. The court of appeals justified its award of attorneys' fees to the Sierra Club and EDF on the ground that, although they did not succeed in correcting or improving EPA's implementation of the Clean Air Act in any way, they had "substantially contributed" to judicial interpretation of the statute. Although the court had affirmed EPA's interpretation of the statute in every respect, it held that judicial review was, in itself, an "express" goal of the Clean Air Act, and that by furthering that goal respondents had earned an award of attorneys' fees. Yet the only "express" goal of the Clean Air Act that is conceivably relevant to this case is the mandate "to protect and enhance the quality of the Nation's air resources * * *" (42 U.S.C. (Supp. IV) 7401(b)(1)). Quite clearly, respondents' unsuccessful litigation did nothing to promote that goal. And there is nothing in the statute or its legislative history to support the conclusion that Congress meant to fund litigation for its own sake. On the contrary, proposals for public interest funding considered by Congress contempo-

raneously with passage of Section 307(f) of the Clean Air Act clearly demonstrate that Congress thought the award of attorneys' fees to totally unsuccessful litigants would be "inappropriate."

ARGUMENT

I

SECTION 307(f) OF THE CLEAN AIR ACT DOES NOT, ON ITS FACE, CONTAIN THE REQUISITE WAIVER OF SOVEREIGN IMMUNITY TO SUPPORT AN AWARD OF ATTORNEYS' FEES TO LOSING LITIGANTS

In applying Section 307(f) to this case, the court of appeals ignored the doctrine of sovereign immunity. That doctrine requires that Section 307(f) be strictly construed in the government's favor.

As sovereign, the United States is immune from claims for attorneys' fees, as it is immune from any other claims, except to the extent that it has waived its immunity. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 & n.42 (1975); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Court has emphasized that such a waiver "cannot be implied but must be 'unequivocally expressed.'" *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982), slip op. 6, quoting *Testan*, *supra*; *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

Where Congress has waived sovereign immunity, its waiver is to be "construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). Thus, in interpreting a statute that waives the immunity of the United States, the courts

should not "enlarge its liability * * * beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Strict construction conserves the public fisc and limits recovery to those situations in which it may confidently be concluded that Congress has determined that the government should be liable. See, e.g., *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955).

The question in this case, therefore, is whether Congress, in authorizing attorneys' fee awards when "appropriate," clearly provided for fee awards to totally unsuccessful litigants. In examining the plain language of the statute, moreover, the context and background against which the term was chosen must be considered. As this Court concluded in *Lehman* v. *Nakshian*, 453 U.S. 156, 161-162, 168-169 (1981), interpretation of terms used in waivers of sovereign immunity must be informed by the usual practices of Congress.

In *Lehman*, the question presented was whether a congressional waiver of immunity authorizing "legal" relief against the United States included the right to trial by jury. This Court acknowledged that, in other contexts, a statutory provision for "legal" relief may encompass a right to a jury trial. 453 U.S. at 163. But, when viewed in the context of a waiver of sovereign immunity which historically is almost always accompanied by denial of the right to a jury trial, the use of the term "legal" did not convey the requisite express consent to jury trials. *Id.* at 161, 163. When the asserted waiver of sovereign immunity represents a radical departure from the usual practice of Congress, therefore, "[t]he appropriate inquiry * * * is whether Congress clearly and unequivocally" intended the change. *Id.* at 162.

This rule counsels special caution in reviewing the court of appeals' decision in this case. In general, attorneys' fees are not available to parties that do not prevail on any claim.[4] Indeed, the traditional American Rule "has long been that attorney's fees are not ordinarily recoverable" even by prevailing parties. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717-718 (1967). This practice has frequently been contrasted to the rule in England, where the prevailing party, plaintiff or defendant, customarily recovers attorneys' fees. *Id.* at 717 & n.10.

Over the years, the courts have developed certain limited exceptions to the American Rule, permitting, for example, a fee award "to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons' " (*Hall* v. *Cole*, 412 U.S. 1, 5 (1973) (citations omitted)), or to spread the cost of "successful litigation" proportionately among the members of a benefitted class (*id.* at 5-6). In addition, as this Court noted in *Alyeska Pipeline Service Co.*, *supra*, 421 U.S. at 260, Congress has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes

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[4] Cf. *Alyeska Pipeline Service Co.*, *supra*, 421 U.S. at 247; *Hall* v. *Cole*, 412 U.S. 1, 4-7 (1973); *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353, 354-355 (D. Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975). As Judge Wilkey stated in his dissenting opinion in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1, 13 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006:

> All precedent and statute points to the fair conclusion that there is a general presumption against one side (particularly the winner) paying the other's attorneys' fees. Thus, when in doubt, no award will be made. Dramatic deviations from the American rule will be construed against. Similarly, there is a presumption that nonprevailing parties are not entitled to costs.

* * *."[5] Such statutes, however, generally address the concept of "fee-shifting" as it has always been understood, that is, transferring the burden of litigation costs from the successful party to the losing litigant. See *id.* at 261-263. Although these statutes "differ considerably among themselves" (*id.* at 261), the court of appeals in this case did not cite, and we have not found, any previous case, interpreting any of these statutes, in which attorneys' fees were awarded to a party that did not succeed in any way.[6]

Thus, the meaning of the term "appropriate" must be determined against the background of the American Rule and the various equitable and statutory exceptions which permit the burden of fees to be shifted to the losing party. Here, it is undeniable that,

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[5] Contrary to the federal rule established in *Alyeska*, 421 U.S. at 263, 269, the California courts have awarded fees to "private-attorney[s]-general" deemed by the courts to have accomplished a public service. See, e.g., *Serrano* v. *Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). This judicially created doctrine has now been codified in California. Cal. Civ. Proc. Code § 1021.5 (West 1980); see *Woodland Hills Residents Association, Inc.* v. *City Council*, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979). The threshold requirement for such awards, however, is and always has been success on the merits.

[6] Indeed, an early version of the bill that was to become the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325, contained an explicit provision authorizing losing litigants to collect attorneys' fees from the government so long as the court found such awards to be "in the interest of justice." S. 2354, 95th Cong., 2d Sess. (1978). This provision was deemed a "radical" and "unacceptable" departure from current law (*Equal Access to Courts: Hearing on S. 2354 Before the Senate Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th Cong., 2d Sess. 31 (1978)), and was eliminated from the bill prior to the hearing (*id.* at 50).

through Section 307(f), Congress has authorized some attorneys' fee awards against the government. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977) ("In adopting this provision concerning fees, the committee intended to meet the requirement for specific authorization imposed by 28 U.S.C. sec. 2412 and by the Supreme Court's ruling in *Alyeska* * * *"). But Congress' decision to subject the government to attorneys' fee awards under Section 307(f) does not mean that it has consented to awards for totally unsuccessful parties. Clearly, the language of Section 307(f) does not on its face specify that attorneys' fees may be assessed against the government in favor of losing litigants. Indeed, it seems most unlikely that such a radical departure from the American Rule against fee-shifting could have passed Congress with nary a mention, let alone a clear exposition of Congress' intent. And the legislative history of Section 307(f), to which we now turn, does not support the construction placed on the term "appropriate" by the court of appeals.

II

THE LEGISLATIVE HISTORY OF SECTION 307(f) SHOWS THAT CONGRESS INTENDED SOME MEASURE OF TANGIBLE SUCCESS AS A THRESHOLD REQUIREMENT FOR AN AWARD OF ATTORNEYS' FEES

Although it was not until 1977 that Congress provided for attorneys' fees in actions under Section 307, Congress first formulated the "appropriate" standard in Section 304(d) of the 1970 amendments to the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d). The events leading to the 1977 amendment to Section 307, and the legislative history of that amendment, dem-

onstrate that Congress simply intended to provide for Section 307 litigants the same entitlement to attorneys' fees that it had provided for Section 304 litigants in the 1970 Act. The legislative history of the 1970 Act, therefore, is critical to a proper understanding of Congress' intent.

In 1970, Congress provided for the award of attorneys' fees, when "appropriate," in citizens' suits to enforce the Act, brought under Section 304. Congress did not provide, however, for awards of attorneys' fees in actions brought under Section 307, which authorizes direct review in the courts of appeals of the Administrator's actions in promulgating regulations and approving state implementation plans. In *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1973), the First Circuit relied upon Section 304(d) to award attorneys' fees in an action brought under Section 307.[7] This extension of Section 304(d) was subsequently rejected by the Courts of Appeals for the Fifth and District of Columbia Circuits. *Natural Resources Defense Council, Inc.* v. *EPA*, 539 F.2d 1068 (5th Cir. 1976); *Natural Resources Defense Council,*

[7] The court found that that portion of Section 304 permitting suits against the Administrator for failure to perform a nondiscretionary duty would aptly cover the case before it, where the essence of the claim was that the Administrator failed to perform his duty with respect to the review and approval of state implementation plans. The court's problem, however, was that Section 304 citizens' suits may only be brought in district courts, whereas the case before the court had to be filed in the court of appeals under Section 307. The court concluded that Section 307 did no more than specify the forum, and that a suit brought under Section 307 was really an action pursuant to Section 304. Accordingly, the court concluded that Congress had given the necessary authorization for an award of attorneys' fees in actions brought under Section 307. 484 F.2d at 1335-1338.

Inc. v. *EPA*, 512 F.2d 1351 (D.C. Cir. 1975).[8] It was to overcome these latter rulings that Congress amended Section 307 in 1977, adding express authorization for the award of attorneys' fees in cases brought under that section whenever, as under Section 304(d), the court deemed such awards to be "appropriate." As the Senate Report explained (S. Rep. No. 95-127, 95th Cong., 1st Sess. 99 (1977)):

> The purpose of the amendment to section 307 is to carry out the intent of the committee in 1970 that a court may, in its discretion, award costs of litigation to a party bringing a suit under section 307 of the Clean Air Act.
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> The law has been interpreted otherwise. Section 304 of the Clean Air Act specifically authorizes courts to award costs; however, section 307 did not contain a specific authorization. Courts have construed the absence of such authorization in section 307 to indicate congressional intent to prohibit a discretionary award of fees in section 307 suits.

It is thus clear that the purpose of the 1977 amendment to Section 307 was to conform that section to Section 304(d). The Court must therefore look to the history of Section 304(d) to determine the intended scope of the "appropriate" standard.

A. The 1970 Legislative History

In the 1970 Act, Congress authorized courts to award attorneys' fees in "appropriate" cases under Section 304(d), 42 U.S.C. (Supp. IV) 7604(d)—the

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[8] Those courts concluded that Sections 304 and 307 contemplated distinct groups of cases and that Section 304's attorneys' fee provision could not be engrafted onto Section 307 actions.

so-called citizens' suit provision of the Act. Section 304 allows citizens to bring enforcement actions directly against persons or entities alleged to be in violation of the Act or against the EPA Administrator for failure to perform a nondiscretionary duty. Its purpose was to supplement government enforcement efforts and motivate government agencies to take more vigorous enforcement actions themselves.

Through Section 304, Congress sought to enlist the aid of citizens in those situations where the government was not living up to its responsibilities.[9] It is against this backdrop that the Senate Report's explanation of the attorneys' fee provision in Section 304 (d) must be evaluated (S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970) (emphasis added):

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court de-

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[9] As stated in S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-37, 38-39 (1970):

> Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.
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> * * * * *
>
> The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary for failure to exercise his duties under the Act, including his enforcement duties. The Committee expects that many citizen suits would be of this nature, since such suits would reduce the ultimate burden on the citizen of going forward with the entire action.

termines that such action is in the public interest.[10] The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

In providing for attorneys' fees, Congress was thus focusing on two concerns. First, Congress wanted to protect defendants against the burden of frivolous lawsuits.[11] Second, Congress wanted to reward *legitimate* citizens' suits. In this case, the court of appeals apparently read "legitimate" to mean "important, complex and novel" (Pet. App. 13a). But it is clear

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[10] The Senate Report was discussing an earlier version of Section 304(d) that provided for attorneys' fee awards when the court determined that such an award would be in the "public interest." See S. 4358, 91st Cong., 2d Sess. (1970). The bill was later changed to authorize fees where "appropriate." There is no legislative history, however, to suggest that Congress meant anything substantive by the change.

[11] Thus, the first concern the "appropriate" standard was designed to deal with cuts against the award of fees in this case. Far from authorizing fees in favor of unsuccessful *plaintiffs*, the statute was designed to provide fees for successful *defendants*.

from a careful reading of the entire passage that "legitimate" can only have meant *successful*, for the next sentence of the report states that fee awards should "*extend* to plaintiffs in actions which result in successful abatement but do not reach a verdict" (S. Rep. No. 91-1196, *supra*, at 38) (emphasis added). If a "legitimate" action need only be one that unsuccessfully resolves novel questions, then quite clearly it would not be an "extension" to authorize fee awards to plaintiffs who accomplish a tangible pollution control benefit short of judgment.

In adopting the "appropriate" standard, Congress departed from the "prevailing party" and "substantially prevailing party" terminology it had used in other attorneys' fee provisions.[12] Although the court of appeals read this departure as proof that a litigant need not succeed to earn attorneys' fees, this interpretation is unfounded. "Prevailing party" was a term of art, accompanied by years of judicial interpretation. When Congress formulated the "appropriate" standard in 1970, attorneys' fees were awarded only to parties that had actually prevailed in court. See, e.g., *Ex parte Peterson*, 253 U.S. 300, 317-318 (1920); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 430 (8th Cir. 1970); *Best Medium Publishing Co.* v. *National Insider, Inc.*, 385 F.2d 384, 386 (7th Cir. 1967).[13] But in obviating the need for a

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[12] See, e.g., Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) ("prevailing party"); 42 U.S.C. 2000e-5(k) ("prevailing party"); Freedom of Information Act, 5 U.S.C. 552(a)(4)(E) ("substantially prevail[ing]" party).

[13] It was not until 1976, for example, that courts began awarding attorneys' fees to civil rights plaintiffs who "prevailed" by means of a settlement rather than a litigated judg-

plaintiff to "prevail" in the strictly technical sense of obtaining a judgment, Congress clearly retained some measure of success as the basis for an attorneys' fee award—a party still had to "win" in the sense of producing the desired result, albeit without a verdict. As Judge Wilkey put it in his dissent in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1, 15, 19 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006, to be awarded attorneys' fees a party must at least not lose. A fair reading of the Senate Report thus demonstrates that "abatement without final judgment" represents the limits of a court's discretion to award fees to non-prevailing plaintiffs.[14]

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ment. See, e.g., *Foster* v. *Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976); *Richardson* v. *Civil Service Commission*, 420 F. Supp. 64 (S.D.N.Y. 1976); *Parker* v. *Mathews*, 411 F. Supp. 1059 (D.D.C. 1976); *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (E.D. Va. 1976). And it was not until 1976 that the courts awarded attorneys' fees to FOIA plaintiffs who "prevailed" or "substantially prevailed" simply because the government rendered their cases moot by releasing the documents in question. See, e.g., *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977); *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, 546 F.2d 509 (2d Cir. 1976); *American Federation of Government Employees* v. *Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976); *Kaye* v. *Burns*, 411 F. Supp. 897 (S.D.N.Y. 1976). Thus, in 1970, Congress had to abandon the "prevailing party" and "substantially prevailing party" standards to ensure that attorneys' fees would "extend to plaintiffs in actions which result in successful abatement but do not reach a verdict." S. Rep. No. 91-1196, *supra*, at 38.

[14] The report states that fee awards under Section 304(d) "extend to" situations where plaintiffs accomplish a tangible benefit short of judgment; the report does not imply that a fee award is proper when a litigant merely raises novel but unsuccessful contentions (S. Rep. No. 91-1196, *supra*, at 38). The summary "section-by-section" analysis of the Senate Re-

Although the court of appeals recognized the limits of the language in the Senate Report, it nevertheless stated that it did "not read the Report as ruling out all other instances where attorneys' fees would be appropriate" (Pet. App. 4a n.3). Against the backdrop of sovereign immunity that should have informed the court's approach, however, it was not necessary for Congress to "rule out" categories of cases; rather, Congress must clearly and affirmatively "rule in" those situations in which it meant to authorize fee awards.[15] At least as of 1970, therefore, there is no support for the lower court's expansive reading of the "appropriate" attorneys' fee provision.

B. The 1977 Legislative History

As already explained, when, in 1977, Congress provided for attorneys' fees whenever "appropriate" under Section 307(f), its purpose was to conform

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port, however, states that a "court may award costs of litigation to either party whenever the court determines such an award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 91-1196, *supra*, at 65. There is no elaboration on the meaning of "without regard to the outcome of the litigation" but, in light of the more complete explanation of congressional intent at page 38 of the Senate Report, there is no reason to believe that Congress intended any radical departure from the concept of awards to plaintiffs who accomplished something concrete, such as abatement of a pollution violation, yet failed to secure a favorable final judgment.

[15] The court of appeals thus used precisely the same type of legal analysis rejected by this Court in *Lehman*, *supra*. There, the Court held that the district court had erroneously relied on the *absence* of an "explicit refusal" by Congress to authorize jury trials in suits against the government. *Lehman*, *supra*, 453 U.S. at 159.

Section 307 to the standard established in Section 304(d) in 1970. S. Rep. No. 95-127, 95th Cong., 1st Sess. 99 (1977). Ignoring this legislative history, however, the court of appeals held that the 1977 amendment established a new and "far broader" standard for attorneys' fee awards (Pet. App. 4a n.3). To reach this conclusion, the court relied entirely on the 1977 House Report (H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977)).[16] That report provides, in pertinent part (*id.* at 337):

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[16] In a footnote, the court pointed to two other portions of the 1977 legislative history to support its conclusion: the Senate's rejection of a proposal providing that attorneys' fees "shall" be awarded to any party that "prevails" and "may" be awarded to any party that "prevails in part"; and a Senate Committee staff analysis that asked whether it was necessary to "modify existing judicial practice" (Pet. App. 5a n.3).

The "prevailing party" proposal considered by the Senate was inflexible: it would have required an award of fees to whatever party prevailed, without regard to whether that party had furthered or frustrated the goals of the Act. Compare *Carpenter* v. *Andrus*, 499 F. Supp. 976, 978-979 (D. Del. 1980) (denying attorneys' fees to a successful plaintiff under the Endangered Species Act's "whenever * * * appropriate" provision, 16 U.S.C. 1540(g)(4), because the suit failed to "advance the statutory purpose"). The Senate's rejection of this proposal thus sheds little light on the proper interpretation of the provision ultimately adopted.

The Senate's apparent conclusion that "existing judicial practice" did not need to be "modified" also does not support the court's interpretation of Section 307(f). For, when Congress adopted Section 307(f), no court had ever awarded fees to a party that did not succeed in any way. See *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) (petitioners had prevailed on most issues); *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), rev'd on other grounds, 535 F.2d 1318 (D.C. Cir. 1976) (district court awarded fees because

> The committee bill also contains express authority for the courts to award attorneys fees and expert witness fees in two situations.* The judicial review proceedings under section 307 of the act when the court determines such award is appropriate [sic].
>
> In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 [sic] (1st Cir. 1973).
>
> * Such fees are already authorized to be awarded in suits brought under Section 304 of the Act.

The court of appeals believed this language "shows that Congress in 1977 specifically adopted the far broader policy of rewarding substantial contributions to the statutory goals of the Act" (Pet. App. 4a-5a n.3). The initial paragraph of this excerpt, however, like the 1977 Senate Report, simply demonstrates an intent to make Section 307 parallel the existing at-

plaintiffs were denied relief largely due to the city's failure to implement the statute, and the lawsuit was thus a necessary and helpful effort to galvanize the city to action). Indeed, the courts had expressly refused to award fees to parties that had not achieved any measure of success. *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975).

torneys' fee provision in Section 304(d). The court's conclusion that the 1977 amendments expanded the scope of the "appropriate" standard must therefore depend on the second paragraph, and that paragraph offers little support.

To be sure, the second paragraph limits itself to actions under Section 307, and does not mention Section 304 actions. This was, of course, quite natural, since Section 304 was left untouched. Yet, to conclude that this passage demonstrates an intent to expand the "appropriate" standard, one must find that, although it used the same terms, Congress meant to establish a different standard for Section 307 than it had established in Section 304. On its face, such a result seems irrational and, indeed, it cannot be squared with the Senate Committee's explicit intent to bring Section 307 into harmony with Section 304. Cf. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973).

But besides this anomaly in the court's reasoning, the House Committee's language does not support the conclusion that Congress sought to establish a "far broader policy" for the award of attorneys' fees under Section 307. The House Report explains that attorneys' fees are authorized "to encourage litigation which will assure proper implementation and administration of the act * * *." H.R. Rep. No. 95-294, *supra*, at 337. But this phrase does not indicate that Congress intended that unsuccessful litigation could support an award of fees. Nor does the Committee's language suggest that the mere "airing" of new issues serves the public interest. To the contrary, litigation that promotes "proper implementation of the act" is quite obviously akin to the "legitimate" actions contemplated by Congress in 1970 (see pages 19-20, *supra*).

The lower court's expansive reading of the "appropriate" standard must thus rest upon the House Committee's explanation that it had rejected a " 'prevailing party' " standard "largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 [sic] (1st Cir. 1973)." H.R. Rep. No. 95-294, *supra*, at 337. In *NRDC* v. *EPA*, the First Circuit addressed a very narrow question—should it award *any* fees to petitioners who had prevailed on most but not all of the claims they had raised. In resolving this issue in 1973, the court of necessity had to rely on the legislative history of Section 304(d) which, as we have noted, contemplated awards only to successful plaintiffs or to plaintiffs who accomplished something concrete short of judgment. Against this backdrop, the court stated (484 F.2d at 1338) (emphasis added):

> We are not impressed by the government's argument that because *some* issues were decided adversely to petitioners each party should bear its own costs. * * * We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.
>
> Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the

> right to award costs and fees in favor of the EPA. But the challenges here, even those not sustained, were mainly constructive and reasonable. *And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.*

On its face, the First Circuit's opinion is far narrower than the court of appeals here suggested. NRDC *won* major portions of its case; nothing in the First Circuit's opinion suggests that fees would still have been awarded had NRDC failed to prevail on a single issue. The court's dictum about petitioners' useful "watchdog" role cannot be considered in isolation; rather, it must be examined in light of the government's contention that because NRDC lost *some* issues it should be denied *any* fee award. 484 F.2d at 1338. Only in this limited sense can the First Circuit be said to have rejected a "prevailing party" standard,[17] and there is nothing in the 1977 House Report's citation to *NRDC* v. *EPA* that suggests it meant to go beyond that holding. At the least, neither the House Report nor the First Circuit's opinion itself supports the conclusion that Congress meant to fund "watchdogs" when they raise a false alarm.

In its application of the "appropriate" standard to this case, the court of appeals seemed to rely primarily on the First Circuit's suggestion that "[w]e are at liberty to consider not *merely* 'who won' but what benefits were conferred. The purpose of an award of costs and fees is * * * to encourage the

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[17] At the time of the First Circuit's limited rejection of a "prevailing party" standard, that standard was still being narrowly construed by the courts. See pages 20-21 & note 13, *supra*.

achievement of statutory goals." *NRDC* v. *EPA*, *supra*, 484 F.2d at 1338 (emphasis added). But a fair reading of this passage suggests only a rejection of the rigidities of the "prevailing party" standard, permitting the courts flexibility to deny fees to parties who, though successful, did not further the goals of the statute. See note 16, *supra*. In no way does the First Circuit's language suggest that a party could further the achievement of statutory goals without obtaining any measure of success in the litigation.

Thus, even if one considers only the 1977 House Report from which the court of appeals derived its interpretation of Section 307(f), the court's award of attorneys' fees to totally unsuccessful parties is supported only by tenuous inferences from the Committee's admittedly ambiguous explanations. And when one considers all the available evidence of Congress' intent, in the legislative histories from both 1977 and 1970, it is clear that Congress never anticipated the court of appeals' sweepingly expansive interpretation of the "appropriate" standard.[18] In any

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[18] The legislative histories of other statutes containing "appropriate" attorneys' fee provisions are fully consistent with the government's view of the Clean Air Act. For example, the legislative history of Section 505(d) of the Clean Water Act, 33 U.S.C. 1365(d), shows that Congress specifically intended Section 505(d) to be interpreted similarly to Section 304(d) of the Clean Air Act. The House Report merely states this fact. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 132-133 (1972). The Senate Report, S. Rep. No. 92-414, 92d Cong., 2d Sess. 81 (1972), reiterates the rationale of Section 304(d) of the Clean Air Act in language virtually identical to the Senate Report on the Clean Air Act. Thus, the twin purposes of Section 505(d) of the Clean Water Act are to punish frivolous or harassing litigants and to reward citizens' suits that

circumstances, such scant support in the legislative history would compel the conclusion that Congress had not "unequivocally expressed" an intent to waive sovereign immunity. But that conclusion is inescapable

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result in pollution abatement but fail to reach a verdict. The attorneys' fee provision of the Safe Drinking Water Act, 42 U.S.C. 300j-8(d), has in its legislative history no purpose except "[as] a deterrent against frivolous suits." S. Rep. No. 93-231, 93d Cong., 1st Sess. 17 (1973). The legislative history of the attorneys' fee provision in the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. IV) 1270(d), specifically adopts the legislative history of Section 505(d) of the Clean Water Act. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 90-91 (1977). The legislative history of the Toxic Substances Control Act's attorneys' fee provision, 15 U.S.C. 2618(d), construed by the court of appeals in *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), petition for rehearing pending, No. 79-1580, is likewise fully consistent with the government's position herein. Although the court of appeals in *EDF* relied heavily on a statement by Senator Tunney that fee awards under TSCA would be appropriate "where such award is in the public interest without regard to the outcome of the litigation," 122 Cong. Rec. 8301 (1976), the court of appeals failed to analyze the cases Senator Tunney cited in support of that proposition. None of the four cases comes even remotely close to suggesting the appropriateness of an award for the mere airing of losing issues. Rather, in all four cases, plaintiffs "prevailed" either in fact or by obtaining a concrete, tangible benefit for themselves or the class they represented in the form of a definite change in the defendant's conduct. *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1008-1009 (2d Cir. 1975); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 429-430 (8th Cir. 1970); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981, 985 (3d Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969). The court of appeals in *EDF* also glossed over Senator Tunney's statement that "the court should follow prevailing case law which holds that a *successful* plaintiff 'should ordinarily recover an [sic] attorneys' fees' * * *." 122 Cong. Rec. 8300 (1976) (emphasis added).

where, as here, the asserted waiver would work a virtual revolution in the traditional doctrines of attorneys' fees. For it cannot fairly be assumed that Congress effected such a revolution without a whisper of explanation or controversy.

III

RESPONDENTS WERE IMPROPERLY AWARDED ATTORNEYS' FEES FOR MERE PARTICIPATION IN JUDICIAL REVIEW PROCEEDINGS UNDER THE CLEAN AIR ACT AND NOT FOR FURTHERING THE GOALS OF THAT STATUTE

The court of appeals held that an award of attorneys' fees to Sierra Club and EDF was "appropriate" because those parties had " 'substantially contributed' to the goals of the Clean Air Act" (Pet. App. 20a, n.10). As we explained in the preceding section, the courts should indeed consider whether a litigant has contributed to the goals of the Act in determining whether fees are "appropriate," but such a contribution is a requirement in addition to, and not a substitute for, some measure of success in the underlying litigation. See *Carpenter* v. *Andrus*, 499 F. Supp. 976 (D. Del. 1980). In any event, the "substantial contributions" rewarded by the court below did not serve the goals of the Clean Air Act.

The Clean Air Act, in pertinent part, establishes a single goal: "to protect and enhance the quality of the Nation's air resources * * *" (42 U.S.C. (Supp. IV) 7401(b)(1)).[19] But the court of appeals did not

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[19] Section 101(b) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7401(b) sets forth the purposes of the Act:

> (b) The purposes of this subchapter are—
>
> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health

even suggest that Sierra Club and EDF had furthered this objective. Rather, the court found that "prompt resolution of serious questions of statutory interpretation" was also a goal of the statute (Pet. App. 18a). Because Sierra Club and EDF raised issues that "deserved to have been aired" (*id.* at 16a), the court held, they were entitled to fees.

But although the court asserted that judicial interpretation was an "express goal" of the Clean Air Act, it did not point to anything in the statute that supports its conclusion.[20] And surely, unless one views

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and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

[20] The legislative history of Section 307 of the Clean Air Act completely belies the court of appeals' conclusion that prompt judicial interpretation is a "goal" of the statute. Rather, the legislative history reveals that Congress did not wish to completely foreclose judicial review of agency action. It realized, however, that unrestrained judicial review of nationwide regulations or EPA approvals of state implementation plans could seriously undermine uniformity of interpretation throughout the nation and play havoc with the strict time sequences established in the Act. See S. Rep. No. 91-1196, *supra*, at 40-41. For these reasons, it established a 30-day statute of limitations on judicial review and limited the forums in which review might be sought. *Ibid.*

This history does not evidence a congressional intent to encourage judicial interpretation as an end in itself. Instead,

litigation as desirable for its own sake, it is difficult to comprehend how implementation of the Act is furthered when a court finds, in the course of interpreting the Act's provisions, that the Agency was already implementing it correctly. The lower court suggested that such affirmation of the Agency's actions yields important public benefits: "by assisting judicial interpretation of the Clean Air Act, Sierra Club and EDF aided agency implementation and Congressional reevaluation of the Act" (Pet. App. 8a). Yet, where "agency implementation" of the Act is found to be in full accord with congressional intent, it is difficult to appreciate how it is aided by judicial assent. Surely, Congress has ample tools at its command to conduct its own reevaluation of the Act; nowhere in the legislative history is there any support for the notion that Congress thought it needed the assistance of litigants who press unsuccessful claims.

The court found that the award of fees to EDF and Sierra Club was somehow bolstered by the "substantial nature of [their] assistance" to the court's review of the regulations (Pet. App. 16a). But this rationale is, to say the least, debatable.[21] For example,

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it recognizes that, absent complete preclusion of judicial review, legal challenges to agency action were inevitable and should therefore be limited in time and place to avoid damaging the structure of the Clean Air Act.

[21] It is also worth noting that the court of appeals' estimation of respondents' contribution to the litigation increased markedly between the time it rendered its decision on the merits and its opinion on fees. For example, in awarding fees, the court praised EDF for assisting the court's deliberations on the ex parte contacts issue. In *Sierra Club* v. *Costle*, however, the court stated that "[t]he parties," presumably including EDF, did not make the court's task of identifying the actions and incidents that gave rise to EDF's complaints "an easy

the court noted that it was "totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard" (Pet. App. 17a). Yet, absent Sierra Club's ill-founded challenge, there would have been no need for the court even to consider the variable standard. And surely the fact that a litigant's position, though wrong, was competently presented does not make fee-shifting somehow appropriate. Competent representation is nothing more than every litigant's obligation to the courts.

Similarly, the court found that EDF's contributions expedited and "enriched" its consideration of the ex parte contacts issue, and allowed the court to "resolve close questions of interpretation for future rulemaking under the Act" (Pet. App. 18a). But, of course, that consideration too was only necessary because EDF raised the issue in the first place. And

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one." 657 F.2d at 386 n.423. The court also stated (*id.* at 391):

> EDF does not specify which particular features in each of the above-enumerated communications violated due process or constituted errors under the statute; indeed, EDF nowhere lists the communications in a form designed to clarify why any particular communication was unlawful. Instead, EDF labels all post-comment communications with EPA—from whatever source and in whatever form—as "ex parte," and claims that "this court has repeatedly stated that ex parte contacts of substance violate due process."

As noted, the court rejected EDF's position in its entirety. Similarly, the court had no difficulty rejecting Sierra Club's construction of the statute. The court found the language of the statute itself to be relatively clear (*id.* at 319), and concluded that it "critically undercut[]" Sierra Club's position (*id.* at 318). The court found Sierra Club's arguments based on the legislative history no more persuasive (see generally, *id.* at 319-322).

nothing in the Act suggests that Congress meant to pay litigants to resolve questions for the benefit of future rulemakings; to the contrary, Congress rather clearly left that task to the Agency in the first instance.[22]

It is thus apparent that, although the court of appeals purported to reward "public benefits," it has, in effect, granted attorneys' fees for mere participation in judicial review of agency rulemakings. Although such participation may have some value to the court, its does not in itself further any goal of the Clean Air Act, because it does not in any way improve the implementation of that statute. And there is no evi-

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[22] The court of appeals suggested that attorneys' fees were "appropriate" because its decision "apparently provided fuel for discussion about appropriate restrictions on ex parte comments in other administrative proceedings" (Pet. App. 18a). This claim rests entirely on a memorandum of David Stockman, dated June 11, 1981 (J.A. 30-31). The memorandum outlines the roles of the Presidential Task Force on Regulatory Relief and the Office of Management and Budget in agency rulemakings and notes that the procedures therein described will be consistent with the court of appeals' merits decision in this case. There is no indication anywhere in the memorandum, however, that that decision in any way altered the procedures previously employed. And, considering that the court below found that EPA and OMB were already complying with these requirements, there is no reason to believe that any change was effected by this memorandum.

The court also found that Sierra Club and EDF had "effectively supplemented" EPA's defense of its regulations against industry challengers (Pet. App. 7a n.5). But it was Congress' clear intent that EPA and the Department of Justice should defend the regulations promulgated under the Clean Air Act. It is incongruous to assume that Congress also intended to award attorneys' fees to litigants who take it upon themselves to supplement that effort. See *Alabama Power Co.* v. *Gorsuch*, *supra*, 672 F.2d at 4.

dence, either in the statute or in the legislative history, that Congress intended to fund such participation through the award of attorneys' fees.

Indeed, when Congress has considered funding the mere presentation of views, it has spoken clearly. Thus, for example, Congress has expressly authorized EPA to award attorneys' fees for participation in rulemakings under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(c)(4)(A). That statute clearly demonstrates that Congress knew how to draft language awarding fees for the mere presentation of issues and viewpoints, whether or not those viewpoints were ultimately adopted.[23] Such funding is rare, however, and it has *never* been extended to unsuccessful participants in judicial review proceedings.[24] The court of appeals thus committed a funda-

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[23] Under the statute, a rulemaking participant may be awarded fees if that participant "represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding." 15 U.S.C. 2605(c)(4)(A)(i). In deciding what persons represent such an interest, EPA is to take into account "the number and complexity of such issues and the extent to which representation of such interest will contribute to widespread public participation in the proceeding and representation of a fair balance of interests for the resolution of such issues." 15 U.S.C. 2605(c)(4)(A). Clearly, these statutory directives make it appropriate for EPA to compensate persons whose contribution to the public interest lies simply in adding to the variety of public debate on an issue. Nothing remotely comparable can be read into the "appropriate" standard at issue in this case.

[24] Contemporaneously with passage of the 1977 amendments to the Clean Air Act, Congress considered and rejected proposals to fund public participation in agency proceedings through grants of attorneys' fees and other costs. See S. 270 and H.R. 3361, 95th Cong., 1st Sess. (1977). What is striking about these proposals is the sharp distinction drawn between

mental error in concluding that, by providing for attorneys' fees in Section 307(f) of the Clean Air Act "whenever appropriate," Congress intended, sub silentio, to extend such extraordinary benefits to unsuccessful litigants. Certainly, such an intent has not been "unequivocally expressed." Accordingly, Section 307(f) should not be read to authorize an award of attorneys' fees to parties whose sole contribution to the "goals" of the Clean Air Act was the presentation, however competent, of erroneous legal arguments on the meaning of the statute.

Congress assigned to EPA the expensive, time-consuming and important responsibility of implementing the Clean Air Act. When EPA missteps, Congress has encouraged private litigants to invoke judicial review to put the agency back on course. But

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participation in agency proceedings themselves and court actions reviewing agency decisions. Participation fees in rulemaking, ratemaking, licensing or other agency proceedings of importance to the public at large were proposed on the theory that diverse viewpoints would lead to better informed and more defensible agency actions. See *Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the House Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 95th Cong., 1st Sess., Pt. 2, 35 (1977). These public benefits are not reaped by mere participation in judicial review proceedings that take place after final agency action has been completed. Accordingly, in the case of judicial review, the proposals would have authorized fees only when "the court affords such person the relief sought in substantial measure or, after the filing of such action, the agency affords such person the relief sought in substantial measure." S. 270, *supra*, § 707(b). *In addition*, the court had to find that the litigation "served an important public purpose." *Ibid.* See also, *Public Participation in Agency Proceedings: Hearings on H.R. 3361*, Pt. 2, *supra*, at 35. Thus, the sponsors of these proposals obviously felt that funding unsuccessful litigation would be "inappropriate."

where EPA has not strayed, there is little logic in the assumption that Congress intended to pay "self-appointed representatives of the public interest" for validating the agency's fulfillment of Congress' purposes.[25] Respondents were, of course, free to take their disagreements with the Agency's approach to court, but they should not expect the government to pay them for having its course of action vindicated. Rewarding litigants who actually aid agency implementation by using the judicial process to correct administrative errors is more than sufficient incentive for the type of citizen involvement in the implementation of the Clean Air Act contemplated by Congress. Rewarding unsuccessful litigants who do no more than vindicate the Agency's approach to the statute not only does nothing to assist implementation of the Act but, on the contrary, frustrates that purpose by diverting scarce Agency resources from pressing needs. By allowing fees in such cases, the court has divorced the attorneys' fee provision from any discernible congressional goals, to subsidize assistance in the mere "refinement of jurisprudential understanding." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, No. 80-327 (Jan. 12, 1982), slip op. 8.

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[25] *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331, 1338-1339 (1st Cir. 1973).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 82-242

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SIERRA CLUB

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QUESTION PRESENTED

Whether the court below was precluded from awarding attorneys fees to respondents under Clean Air Act § 307(f), 42 U.S.C. § 7607(f) solely because they did not prevail on the merits.

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No. 82-242

In the Supreme Court

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ANNE M. GORSUCH, ADMINISTRATOR,
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VS.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SIERRA CLUB

STATEMENT

Introduction

The issue in this case is whether a court is precluded from awarding attorneys fees to a non-prevailing party under any circumstances pursuant to Clean Air Act § 307(f), 42 U.S.C. § 7607(f). That section authorizes the Court of Appeals to award fees in any case brought under Clean Air Act § 307 "whenever it determines that such an award is appropriate." The court below ruled that the Sierra Club and Environmental Defense Fund should be awarded fees, even though they did not prevail on the merits in an extremely close case. Although awards to non-prevailing parties are rare, the court concluded, in this case, because of the importance, complexity and novelty of

the issues raised, the substantial nature of the contributions of the Sierra Club and Environmental Defense Fund, and the exemplary character of their work, an award would be justified. The government objects, asserting that the Court of Appeals is absolutely precluded from awarding fees to non-prevailing parties.

In order to appreciate the factors which led the court to award fees here, it is necessary to review the underlying litigation. Accordingly, a brief summary follows.

The underlying litigation

Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) was perhaps the most momentous decision ever in the field of environmental law. The opinion had enormous significance in terms of economic, environmental, health and energy impacts. *Sierra Club v. Costle, supra,* 657 F.2d at 313. The issues litigated concerned the degree of air pollution control that would be required at all new coal-fired steam electric power plants to be built in the United States. Such plants account for 48% of the electricity produced in America, and burn 68% of the coal mined in this country. *Sierra Club v. Costle, supra,* 657 F.2d at 313. They also produce immense amounts of pollution—13.6 million tons of sulfur dioxide (SO_2) in 1975. This constituted 64% of the total nationwide sulfur dioxide emissions the following year.[1] *Sierra Club v. Costle, supra,* 657 F.2d at 313.

Under Clean Air Act § 111, 42 U.S.C. § 7401, the Environmental Protection Agency is required to establish standards of performance for major new sources of air pollu-

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[1] SO_2 "at the very least" is "known to cause or contribute to respiratory illnesses. *Sierra Club v. Costle, supra,* 657 F.2d at 11 and references cited at note 10.

tion, such as coal-fired power plants, which reflect the use of the best available control technology, taking into account costs, health and environmental impacts, and energy requirements. Purportedly acting pursuant to the statute as it then read, EPA originally promulgated a new source performance standard (NSPS) for coal-fired power plants of 1.2 lbs. of sulfur dioxide per million BTU (36 Fed. Reg. 24876, December 23, 1971). This first NSPS, in effect, allowed power plants burning low sulfur coal, located mainly in the western United States[2] to comply without using any pollution control equipment, whatsoever. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 656 (D.C. Cir. 1975). It would have permitted a 23% total national annual increase in SO_2 emissions by 1995. *Sierra Club v. Costle, supra*, 657 F.2d at 414.

The Sierra Club and two local government units of the Navajo Tribe were concerned about this vast projected increase in SO_2 emissions, which would be especially severe in the west.[3] They were disturbed that Western power plants could get away without using any SO_2 pollution abatement methods, at all, despite the availability of technology to reduce those emissions by at least 90%. Accordingly, they requested EPA to revise the standard to require at least 90% SO_2 removal at all power plants, regardless of the sulfur content of the coal they burned. The agency refused to consider revising the standard and the petitioners sought review. In *Oljato Chapter of the Navajo Tribe v. Train, supra*, 515 F.2d 654, 667, the Court of Ap-

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[2]Ninety percent of western coal reserves are low sulfur. See *Sierra Club v. Costle, supra*, 657 F.2d at 348, note 179.

[3]SO_2 emissions in the western United States would almost be cut in half if maximum controls are applied. See 44 Fed. Reg. at 33608, Table 3 (June 11, 1979).

peals held that the agency was required to consider the petitioners' request seriously and provide a substantive response. The court instructed them to file a formal, detailed petition with EPA to initiate the process.

Accordingly, the Sierra Club and the Navajo groups filed a petition for a revision of the NSPS to require uniform 90% SO_2 removal in August, 1976. The filing of the petition attracted tremendous attention nationwide as it became widely known that SO_2 emissions from new Western power plants were not being regulated. The matter quickly came before Congress and, as part of the comprehensive 1977 amendments, it added a requirement to Clean Air Act § 111 that EPA must promulgate a specific percentage reduction standard, as well as an emission limitation requirement. Thus, actual, technological means of emission control would have to be used at all power plants. The Conference Committee report indicated that the percentage reduction was to be uniform nationwide, although departures from a uniform standard based on varying fuel characteristics would be allowed under limited circumstances. H.R. Rep. No. 95-564, 95th Cong., 1st Sess., p. 130 (1977).

The rule making proceeding on the Sierra Club petition lasted almost three years and amassed an unbelievably large and complex record, including 120 studies prepared by EPA, 400 technical papers, and 1,400 public comments. There was a total of 2,520 items in the official administrative record. The Joint Appendix in *Sierra Club v. Costle*, which contained only a small fraction of the record, consisted of 5,620 pages. See *Sierra Club v. Gorsuch*, 672 F.2d at 40. The major issues involved—the efficacy and reliability of various SO_2 control methodologies, econometric modeling of the impact of various standards on utility be-

havior, and the impact of alternative standards on usable coal reserves—involved a staggering degree of technical complexity. See *Sierra Club v. Gorsuch*, 672 F.2d at 39. *Sierra Club v. Costle, supra*, 657 F.2d at 410.

Because of the huge economic[4] and environmental consequences of EPA's decision, the "conflicting interests play[ed] fiercely for enormous stakes . . ." (*Sierra Club v. Costle, supra*, 657 F.2d at 410). Health and environmental groups urged the agency to implement a "full control" strategy—requiring 90% SO_2 removal at all power plants. The utility industry, concerned over the immense costs involved, advocated a "sliding scale" standard. Under this concept, the industry suggested, plants burning the lowest sulfur coal would be subject only to a 20% (later 50%) removal requirement. The percentage removal requirement would increase proportionally for higher sulfur content coals, to a maximum of 85%. *Sierra Club v. Costle, supra*, 657 F.2d at 354[5].

The agency first proposed a "full control" alternative, similar to that advocated by the Sierra Club, 42 Fed. Reg. 42154, 42160, col. 3 (September 19, 1978). However, the final rule, adopted June 11, 1979, opted for "variable control", a variation on the utilities' "partial control" sugges-

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[4]EPA estimated full control would cost $45 billion and the least stringent alternative standard would cost $31 billion. See 44 Fed. Reg. at 33609, Table 5 (June 11, 1979).

[5]The coal industry was interested in making sure that the 1.2 lbs./MBTU emissions limitation was not lowered, as some EPA trial balloons indicated it might be. See *Sierra Club v. Costle, supra*, 657 F.2d at 386. That industry feared that a lower emission limitation might mean that certain high sulfur coals would no longer be suitable for burning at power plants. See *Sierra Club v. Costle, supra*, 657 F.2d at 384-86.

tion, in which the percentage reduction would decrease for lower sulfur coals down to a minimum of 70%. 44 Fed. Reg. 33580, June 11, 1979. See *Sierra Club v. Costle, supra,* 657 F.2d at 316.

The agency advanced two principal arguments for its choice of variable, rather than full control. First, it developed and utilized an econometric computer model to predict utilities' reactions to various alternative standards and hence to derive estimates of the costs, energy requirements, and environmental impact associated with each of those standards. *Sierra Club v. Costle, supra,* 657 F.2d 321-27. EPA's model predicted that the variable standard would yield best results in all three categories.

Second, the agency asserted that a less stringent, 70% removal requirement was necessary in order to encourage an emerging and potentially superior new technology for removing SO_2 from low sulfur coals—dry scrubbing. EPA claimed that since it was unclear whether dry scrubbing was capable of going beyond 70% removal, utilities would not choose to employ the new methodology if the standard were greater than 70%. See *Sierra Club v. Costle, supra,* 657 F.2d at 343.

The Sierra Club thereupon filed a petition for review in the D.C. Circuit Court of Appeals pursuant to Clean Air Act § 307, contending that EPA should not have deviated from the uniform full control requirement it had originally proposed. It objected to EPA's regulatory analysis, which attempted to predict long-term national trends for alternative levels of control. In any event, the Sierra Club argued, the econometric computer model used by EPA to make those predictions was flawed by improper assumptions and methodology.

It also argued that the dry scrubbing rationale relied upon by the agency was improper, since dry scrubbing had not yet been "adequately demonstrated", and so could not serve as the basis for a NSPS. Furthermore, the Sierra Club asserted, the administrative record refuted EPA's contention that dry scrubbing could not achieve more than 70% SO_2 removal and that utilities would not use that technology if the removal requirement were any higher. Finally, the Sierra Club objected to EPA's introduction of the dry scrubbing rationale and the "variable control" option after the public comment period had expired and only days before the final rule was issued.[8]

The Court of Appeals turned down these arguments in *Sierra Club v. Costle, supra,* 657 F.2d 298. First, it construed Clean Air Act § 111 to permit the agency to assess national, regional, and long-term economic, environmental, and energy impacts, rejecting our contention that the Act excluded consideration of those factors. *Sierra Club v. Costle, supra,* 657 F.2d at 329-332. The court was "more sympathetic to the Sierra Club's complaint about the reliability of EPA's econometric model." 657 F.2d at 332. Nonetheless, it reasoned, computer modeling offers the only realistic method of making immensely complex analysis demanded by the statute. 657 F.2d at 332-33. In a landmark holding, the court concluded that, because of the dangers that a modeling format may "improperly skew" an agency's analysis, it must employ certain "safety valves": public notice and the acceptance and consideration of public

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[8]The "variable control" standard was also attacked by the utility industry on the ground that the 90% maximum removal standard was too stringent. The Environmental Defense Fund sought review of EPA's reaffirmation of the 1.2 lbs./MBTU emission limitation.

comment on the assumptions and data incorporated in the model; the admission of uncertainties; and the acceptance of ultimate responsibility for the decision by the agency, itself, rather than the computer. 657 F.2d at 334.

On the dry scrubbing controversy, the court agreed that the Sierra Club had shown that "dry scrubbing can achieve significantly better than the 70% floor adopted by EPA", (657 F.2d at 348, esp. note 179) and also that removal efficiencies of higher than 70% would still be economical. 657 F.2d at 350, note 184. After a detailed summary of the record, the court conceded that "the support in the record for selecting 70% as the magic percentage for encouragement of dry scrubbing is less than overwhelming." 657 F.2d at 351. The court also agreed that "given the state of this record we would have been reluctant to uphold EPA's discretion to vary the standard solely on the basis of dry scrubbing . . ." 657 F.2d at 351. Nevertheless, since "variable control" was sufficiently justified under the "regulatory analysis" discussed above, the court concluded it could not overturn the agency decision. 657 F.2d at 351-52.

Finally, the Court of Appeals acknowledged that "Sierra Club's criticism of the procedural history of the variable standard is not unwarranted . . ." 657 F.2d at 353. It also conceded that "this rule making was by no means a neat and tidy proceeding, and it might well have been the wiser course if EPA had chosen to publish a new proposal for another round of comments." *Id.* at 356. But the Court of Appeals found it was constrained to uphold the EPA action because of the special, "rigorous" standard for judicial review of procedural errors contained in Clean Air Act § 307(d)(8), 42 U.S.C. § 7607(d)(8): "The procedural error must be 'of central relevance to the outcome of the

rule,' and 'the errors were so serious and related to matters of such central relevance to the rules that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" 657 F.2d at 391.

The lower court also recognized another limitation on its authority to review the EPA's decision—this Court's opinion in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). In that case, the lower court noted, this Court "unambiguously cautioned" it "against imposing its own notions of proper procedures upon an administrative agency entrusted with substantive functions by Congress." 657 F.2d at 183.[7]

The court summed up its encyclopedic opinion[8] as follows:

> We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages. We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise—and more.
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[7]The lower court also rejected the challenges presented by Environmental Defense Fund and the utilities.

[8]The opinion was 132 pages long and contained 540 footnotes.

> We cannot redo the agency's job; Congress has told us, at least in proceedings under this Act, that it will not brook reversal for small procedural errors; *Vermont Yankee* reinforces the admonition. So in the end we can only make our best effort to understand, to see if the result makes sense, and to assure that nothing unlawful or irrational has taken place. In this case, we have taken a long while to come to a short conclusion: the rule is reasonable. 657 F.2d at 410.

Attorneys fees awarded

The Sierra Club and the Environmental Defense Fund moved for attorneys fees for their participation in the *Costle* case, pursuant to Clean Air Act § 307(f), 42 U.S.C. § 7607(f), which was added as part of the 1977 amendments. It provides:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate.

In *Sierra Club v. Gorsuch*, 672 F.2d at 33 (D.C. Cir. 1982) the Court of Appeals unanimously agreed that the Sierra Club and EDF were entitled to fees, even though they had not prevailed on the merits. In rejecting the government's contention that a fee award is not "appropriate" unless a party prevails in whole or in part, the lower court held that while the Sierra Club and EDF did not "substantially prevail", they *did* "substantially contribute to the goals" of the Clean Air Act. The issues raised were "important, complex, and novel", the contributions of EDF and the Sierra Club were "substantial and not duplicative" of those of other parties, and the caliber of their presentations was "exemplary". 672 F.2d at 39.

The court reviewed the supreme importance and complexity of the technical and statutory construction issues outlined above, and credited the role of the Sierra Club in raising and helping to dispose of crucial issues under the 1977 Clean Air Act Amendments:

> Although it seems almost inconceivable that a major review of the rule could have been conducted without questioning EPA's authority and evidentiary basis for promulgating a variable percentage reduction standard, an issue that the EPA Administrator had referred to at the start of the rulemaking as the "main" issue in the proceeding, Sierra Club was the only party to raise it. The court was thus totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard. Without Sierra Club, an issue conceded by EPA to be critically important would not have been raised or decided during the first judicial challenge to the statutory provision. The absence of debate on the issue, moreover, could have affected the outcome of other related issues in the case, *e.g.*, the proper levels of total emissions (the so-called 1.2 lbs./MBTU standard), since individual standards of section 111 operate interdependently. And the argument pressed most intensely by the utilities, that a 90% reduction in sulfur emissions was technologically infeasible given the state of antipollution technology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decision on other parts. 672 F.2d at 40-41.

The lower court concluded that because of their substantial contributions to the resolution of the important issues

raised in the litigation, the Sierra Club and EDF should be compensated:

> In conclusion, we find that the express goals of the Clean Air Act—prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits—require that substantial contributions to significant litigation in furtherance of these goals be compensated. It was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking process not only involved highly technical and complex data, but controversial considerations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed. 672 F.2d at 41.

SUMMARY OF ARGUMENT

1. The literal language of Clean Air Act § 307(f) clearly permits the court to award fees to non-prevailing, as well as prevailing and substantially prevailing parties. This Court is not at liberty to construe the statute so as to add limitations not imposed by the statute on the lower court's discretion to award fees. It may not inquire into the wisdom of the legislature's judgment. Common law doctrines to the contrary must yield before the specific statutory authorization for fees in this case.

2. The committee reports for § 307(f) and Clean Air Act § 304(d), a parallel attorneys fees provision, unambiguously endorse fees for non-prevailing parties in appropriate cases. Congress specifically rejected an early attempt to limit the fees provision to parties who prevail in

whole or in part. Instead, it cited and endorsed judicial language sanctioning fees for parties who did not prevail. This Court should not be lulled into accepting the government's attempts to manufacture legislative history which contradicts Congress' clearly expressed intent.

3. Every judicial opinion which has considered this issue has endorsed the viewpoint of the court below. This Court should honor the principle of stare decisis and follow those decisions.

4. Public policy considerations do not justify a departure from Congress' clearly expressed intent. Awarding fees to respondents in this action will not provoke an avalanche of unjustified lawsuits. Fee awards to non-prevailing parties will be made only in the most exceptional cases and, in any event, the substantial amounts of non-compensable time which must be expended in order to perfect an action under Clean Air Act § 307 will discourage potential litigants with marginal causes of action.

ARGUMENT

I

THE STATUTORY LANGUAGE SUPPORTS THE COURT'S CONSTRUCTION

A. This Court is bound by the statute, as written

Clean Air Act § 307(f), 42 U.S.C. § 7607(f) states that a court "may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines that such an award is appropriate.*" [Emphasis supplied.] As the Court of Appeals pointed out, "on its face, the statutory provision clearly permits the court to award attorneys' fees to prevailing, substantially prevailing, or

non-prevailing parties in 'appropriate' cases." 672 F.2d at 34.

Nonetheless, the government argues that the Court of Appeals may not award fees to a party who does not prevail in whole or in part. (See, *e.g.*, Petition for Certiorari, pp. 18-19; Brief, p. 15). The government asks this court to re-write the statute, so as to restrict the courts' discretion to find an award of fees "appropriate" exclusively to cases in which the party seeking fees has prevailed in whole or in part. In short, it seeks a judicial amendment of Section 307(f) from an "appropriate" to a "prevailing party" standard. The justification offered by the government for this remarkable request is that the court below "has established a precedent that threatens to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation." Petition for Writ of Certiorari, p. 8; see also Brief, pp. 36-37.

This court has emphasized time and again that it is not empowered to amend laws enacted by Congress, even in the face of strong evidence that the legislation in question is highly unwise. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the TVA sought to overturn an injunction which had been issued against completion of the Tellico Dam in Tennessee, on which more than $100 million had already been spent, because the dam threatened to exterminate the snail darter, a tiny local fish which had been listed as an endangered species pursuant to the Endangered Species Act of 1973. Section 7 of that Act, 16 U.S.C. § 1536, requires all federal agencies "to ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or destroy or modify its habitat.

TVA argued that Section 7 was not intended to stop operation of a project, such as the Tellico Dam, which was near completion when an endangered species was discovered in its path. The agency also pointed to Congressional appropriations earmarked for completion of the dam subsequent to discovery of the snail darter and to committee reports stating that the Endangered Species Act should not apply to the Tellico Dam. See 437 U.S. at 170-171.

The Chief Justice, speaking for this Court, conceded that "it may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million." 437 U.S. at 172. But, he emphasized, this Court was not empowered to act upon the "common sense" suggestion of TVA that "the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter." 437 U.S. at 157. The opinion pointed out that it would be extremely difficult for a court to balance these two factors "even assuming we have the power to engage in such a weighing process, which we emphatically do not." 437 U.S. at 188. The *TVA* opinion disposed of a plea, much like that of the government in the present case, to construe the Endangered Species Act "reasonably":

> Here we are urged to view the Endangered Species Act "reasonably", and hence shape a remedy "that accords with some modicum of common sense and the public weal." . . . But is that our function? We have no expert knowledge on the subject of Endangered Species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam.
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> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
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> [I]n our constitutional system, the commitment to the separation of powers is too fundamental for us to preempt Congressional action by judicially decreeing what accords with "common sense and the public weal." Our constitution vests such responsibilities in the political branches. 437 U.S. 194-95.

This court has continued to adhere strongly to the principle that the judiciary may not usurp Congress' legislative function, regardless of how ill-advised it may consider a particular piece of legislation. In *Touche Ross & Co. v. Redington,* 442 U.S. 560, 578 (1979), it noted that "The ultimate question is one of Congressional intent, not one of whether this court thinks it can improve upon the statutory scheme that Congress enacted into law." The court noted that the plaintiffs ". . . contend that the result we have reached sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate." See also *Universities Research Ass'n. v. Coutu,* 450 U.C. 754, 770 (1981); *Rubin v. United States,* 449 U.S. 421, 431, note 8 (1981).

In *Diamond v. Chakrabarty,* 447 U.S. 303 (1980), the issue was whether a patent could be obtained upon a new micro-organism produced in the laboratory by genetic engineering. The commissioner of patents and trademarks argued that living things, such as micro-organisms, could

not be patented. This court refused to be swayed by a "gruesome parade of horribles," set forth by the patent office and a number of Nobel laureates on the dangers of genetic research, which would presumably be encouraged by a decision in favor of patentability. This court refused to consider these assertions:

> [W]e are without competence to entertain these arguments—either to brush them aside as fantasies generated by fear of the unknown, or to act on them . . . whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the executive, and not to the courts. 447 U.S. at 317.

The court went on to quote from *TVA v. Hill* for the proposition that it could not decide on the wisdom of a particular statute. "Our task, rather, is a narrow one of determining what Congress meant by the words it used in the statutes; once that is done our powers are exhausted." 447 U.S. at 318. Congress is free to change the law, it continued, "but, until Congress takes such action, this court must construe the language of [the patent statute] as it is." *Ibid.*

Here, as in *Diamond*, the government presents a "parade of horribles"—"unproductive, expensive and time-consuming litigation"[9]—as a justification for this Court to ignore the unmistakable intent of Congress and change Clean Air Act § 307(f) by imposing a "prevailing party" requirement. As we show in Point II, Congress specifically re-

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[9]As we show in Point IV below, these dire forebodings are nothing but legalized fantasies. No one will lightly undertake major litigation of this sort on the very slim chance that he may collect attorneys fees if he loses.

jected such a limitation. This Court may not now reinstate it.

B. The common law doctrines concerning attorneys fees and sovereign immunity do not apply in this case

The government maintains that the lower court's ruling "is inconsistent with certain fundamental considerations underlying the doctrine of sovereign immunity and the traditional rules governing the allocation of attorneys' fees." (Brief, p. 13). But in this case, the Court of Appeals acted pursuant to a specific statutory authorization, not the common law. As this Court has recognized for over a century, ". . . a common law maxim . . . must yield to statutory provisions inconsistent with it . . ." *Wallach v. Van Riswich,* 92 U.S. 202, 212 (1875).

The Sierra Club does not quarrel with the government's assertion that Congressional consent to waive statutory immunity must be "unequivocally expressed." (Brief, p. 13). In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 261 (1975), this court recognized that Congress may provide for attorneys fees, thereby overriding the common law rule, and has done so, "in a variety of circumstances." The Court also noted that attorneys fees may be awarded against the government only if "expressly provided for by statute."

Congress specifically stated it intended to meet the *Alyeska* test in this instance. The House Report on § 307 (f) referred to the *Alyeska* decision as follows: "In adopting this provision concerning fees, the committee intended to meet the requirement for a specific authorization imposed by 28 U.S.C. § 2412 and by the Supreme Court's ruling in *Alyeska* . . ." H.R. Rep. No. 95-294, 95th Cong., 1st

Sess., p. 337 (1977). There could hardly be a more emphatic statement of legislative intent; indeed, the government concedes that "Congress meant to waive the government's traditional immunity and to overcome the presumption of the 'American Rule' against fee shifting." (Petition for Certiorari, p. 15).

Thus, its reliance on such cases as *United States v. Testan*, 424 U.S. 392, 399 (1976) and *Lehman v. Nakshian*, 453 U.S. 156 (1981) is completely misplaced. In *Testan*, this Court refused to imply the existence of a cause of action against the government for a wrongful civil service classification in the absence of a specific statute authorizing such a proceeding. In *Lehman* it held that absent a specific statutory authorization, there was no right to a jury trial in an action against the federal government under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-34 (1970). But neither of those cases nor any others cited by the government involved a specific authorization such as we have here.

II

THE LEGISLATIVE HISTORY OF CLEAN AIR ACT § 307(f) SHOWS THAT CONGRESS INTENDED TO ALLOW THE COURTS TO AWARD FEES TO NON-PREVAILING PARTIES IN APPROPRIATE CIRCUMSTANCES

The House Report on Clean Air Act § 307(f) specifically rejected the concept of limiting fees to prevailing parties:

> "In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise

> serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party". In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC v. EPA*, 484 F.2d 1331, 1388 (1st Cir. 1973)" H.R. Rep. No. 94-294 95th Cong., 1st Sess., p. 337 (1977).

The Senate, too, specifically rejected a provision that would have limited fees to prevailing or substantially prevailing parties. The rejected language would have required the court to award fees to a prevailing party and would have given it discretion to award fees "in any case in which such party prevails in part . . ." See Sen. Committee on Environment and Public Works, "A Legislative History of the Clean Air Act Amendments of 1977," 95th Cong., 2nd Sess., vol. 3, p. 688 (Committee Print 1978), hereinafter cited as "Legislative History". The rejected language was taken from S252, a bill passed by the Senate in the previous session, but never enacted. See Legislative History, pp. 3856, 3893.

Congress was well aware that the new fees provision marked a significant expansion of the previous language. A section-by-section analysis of S252 prepared by the Senate Subcommittee on Environmental Pollution noted that there was an area of "controversy" concerning the need to prevail in order to be awarded fees. It raised the question, "Should the basis for an award of fees be need, rather than the judicial disposition of the suit?" Legislative History, p. 3893. That Subcommittee was also advised by the law firm of Hunton & Williams (who represented the utility industry in the underlying litigation in this case), on behalf of the Edison Electric Institute that the language of S252 is

"less sweeping" than the new "appropriate" standard. Legislative History, pp. 4146-47.

The language in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973), which was specifically endorsed by the House Report on § 307(f), further supports the view that attorneys fees may be awarded to a non-prevailing party:

> We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

The government (Brief, pp. 27-28) seeks to avoid the force of the quoted language by pointing out that the petitioners in the *NRDC* case prevailed on some of their issues. Thus, it is claimed, the court's rationale departs from a "prevailing" requirement only to the extent that it endorses fees for a partially prevailing party.

But that is not what the court said, nor what it held. The court *said* it need not be bound by "who won" or lost the case and it *held* that the petitioners were entitled to fees even on their losing issues:

> "But the challenges here, even those not sustained, were mainly constructive and reasonable. And petitioners were successful in several major respects; they should not be penalized for having also advanced some point of lesser weight." 484 F.2d at 1338.

In any event, the House Report on Section 307(f) endorsed the generalized "grounds" set forth in the *NRDC* opinion, not the holding under the particular facts of that case.

The government seeks to avoid the clearly-expressed legislative intent to abandon the "prevailing party" requirement in Clean Air Act § 307(f) by labeling it "tenuous inferences", based on "ambiguous explanations." (Brief, p. 28). Instead, it contends, Congress added § 307(f) in 1977 solely for the purpose of conforming it to § 304(d), 42 U.S.C. § 7604(d). That section, added in 1970, authorizes awards of attorneys fees in "appropriate" cases brought under Clean Air Act § 304. Section 304(d), it is argued (Brief, pp. 17-22), does not allow fees to non-prevailing parties; therefore, § 307(f) should not be construed to do so, either.

This analysis is flawed in three major respects. First, the 1977 legislative history reveals that Congress intended to do more by adding § 307(f) than merely to conform attorneys fees practice under § 307 with that under § 304. Second, actions under the two sections are fundamentally different in nature and scope, so that the considerations governing the appropriateness of fee awards under each of them are distinct. Finally, both Congress and the courts agree that fees may be awarded to non-prevailing parties under § 304(d), as well as § 307(f).

As the government correctly points out, in the 1970 Clean Air Act Amendments, attorneys fees in "appropriate" cases were specifically authorized for actions brought under § 304, but not under § 307. With the exception of *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973), discussed above, the courts refused to allow fees in actions brought under § 307 in the absence of a specific

statutory authorization. The Senate Report on § 307(f) *did* indicate that its purpose was specifically to authorize fees in actions under § 307, as originally intended in 1970, and noted that § 304 already specifically authorizes fees. S. Rep. No. 95-127, 95th Cong., 1st Sess., p. 1473 (1977). But that hardly supports a conclusion that the *only* purpose of the change was to "conform" the two sections. Indeed, as we show below, actions under the two sections are fundamentally different and cannot readily be "conformed".

In any event, the House Report set forth another goal for § 307(f): ". . . to encourage litigation which will assure proper implementation and administration of the Act or otherwise serve the public interest." The House also reacted to two significant judicial developments which had occurred since 1970: the allowance of fees to non-prevailing parties as suggested in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973) and the requirement set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that a statute must specifically authorize fees against the government. The final version of § 307(f) approved both the Senate and the House provisions. See Conference Report, H.R.Rep.No. 95-564, 95th Cong., 1st Sess., p. 557 (1977).

A closer examination of the nature and purposes of the Clean Air Act's two citizen suits provisions reveals important differences. Section 304(a) authorizes citizens to bring suit in district courts against persons who violate a standard or order issued under the Clean Air Act or against EPA if it fails to perform a non-discretionary duty under the Act. The legislative history of § 304 makes it abundantly clear that Congress considered that the primary function of citizens suits under § 304 was to aid in

the enforcement of standards and regulations under the Act. The purpose of suits under § 304, therefore, was to assure abatement of illegal air pollution. Accordingly, the Senate Report limited its discussion of when fees would be available to non-prevailing parties to a typical situation which might occur under § 304—abatement of a violation before a verdict was obtained in the litigation. See S.Rep. No. 91-1196, 91st Cong., 2nd Sess., p. 38 (1970).

Section 307 serves a different purpose. It provides an "opportunity for judicial review of administratively developed and promulgated standards and regulations." S. Rep.No. 9-1196, 91st Cong., 2nd Sess., p. 440. Administrative actions reviewable under § 307 are all national or regional in scope. Therefore, petitioners for review under § 307 are to be tried in the Court of Appeals. *Id.* at 441. Actions under § 307 have nothing to do with *enforcement* of air pollution standards; instead, their purpose is to *challenge* those standards. Accordingly, the Senate Committee's reference to abatement before verdict under § 304 would make no sense in the context of a § 307 action.

Therefore, the government's argument simply does not hold water. It concedes that "success on the merits, in the traditional sense of a favorable final judgment, is not a prerequisite for an award of fees under [§ 307]." (Petition for Certiorari, p. 16.) But, it asserts, an award to a non-prevailing party is limited to a situation in which there is pollution abatement in the absence of a final verdict for the plaintiff. While this argument may have some surface plausibility with respect to actions under § 304,[10] it makes

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[10]However, as we show below, non-prevailing parties *are* entitled to fees in appropriate cases under § 304(d).

no sense in the context of § 307(f). Since proceedings under § 307 challenge the standards, themselves, and are not aimed at any specific source of pollution, there is no possibility of abatement of pollution without a final verdict under § 307. Therefore, an award to a non-prevailing party under § 307(f) must refer to something else—*i.e.*, a party who contributes to the goals of the Clean Air Act by helping to insure a proper interpretation of significant issues under the Act.

Finally, even if sections 307(f) and 304(d) should be interpreted the same, the lower court should be upheld, since fees may be awarded to non-prevailing parties under both sections. Section 304(d), like § 307, authorizes fees to "appropriate" parties. As we noted above, the Senate Report on § 304(d) gives one example in which a non-prevailing party may be awarded fees—where abatement of a violation occurs before a final verdict. But this example was not intended to mark the limits of when fees could be awarded under § 304(d). In the section-by-section analysis, the Senate Report notes that: "The court may award costs of litigation to either party whenever the court determines such an award is in the public interest *without regard to the outcome of the litigation.*" [Emphasis added.] S.Rep. No. 91-1196, *supra*, at 65. And Sen. Spong, a prominent supporter of the Clean Air Act, remarked during debate on § 304(d): "The courts are given discretionary authority to award costs, including reasonable attorney and witness fees to *any* party." [Emphasis added.] Senate consideration of the report of the Conference Committee, December 18, 1970, reprinted in "A Legislative History of the Clean Air Act Amendments of 1970," 93rd Cong., 2nd Sess., vol. 1, p. 147 (1974).

The government (Brief, pp. 20-21) attempts to construct, through hindsight, a legislative history to support its view of the switch from a "prevailing party" to an "appropriate" standard in section 304(d). It claims that the sole purpose was to obviate the need for a plaintiff to prevail "in the technical sense of obtaining a judgment" in order to collect fees, citing several opinions which refused to award fees to parties who had not obtained a favorable judgment. But there is no indication that Congress was actually reacting to those cases, or even knew about them. What the Senate Report *does* say, in the clearest possible terms, is that fees may be awarded in the public interest "without regard to the outcome of the litigation." S.Rep. No. 91-1196, *supra*, at 65. The government invites this court to disregard this unambiguous statement because "there is no elaboration" on its meaning and, instead, to rely on its own phantom legislative history to ascertain Congressional intent. While the search for legislative intent always involves some degree of imagination, we are confident that this Court will base its opinion on the language of Congress, rather than the fiction by the Solicitor-General's office.

The courts have consistently construed § 304(d) to allow fees to non-prevailing parties. See, *e.g., Natural Resources Defense Council v. EPA, supra,* 484 F.2d 1331, 1338 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.,* 62 F.R.C. 353, 355 (D. Del. 1974); *Citizens Association of Georgetown v. Washington,* 383 F. Supp. 136 (D.D.C. 1974), reversed on other grounds, 535 F.2d 1318 (D.C. Cir. 1976); *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981). It should be remembered that the

House Report on § 307(f) specifically endorsed the construction of § 304(d) found in the *Natural Resources Defense Council* case.

III

JUDICIAL CONSTRUCTION HAS UNANIMOUSLY APPROVED FEES FOR NON-PREVAILING PARTIES

As we noted in the preceding paragraph, the courts have unanimously construed the "appropriate" standard of § 304(d) to allow fees to non-prevailing parties. The opinion in *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981) is particularly instructive, since it puts to rest the government's persistent argument that a non-prevailing party must achieve some tangible benefit, other than explication and interpretation of the Clean Air Act. There, citizens sought to enjoin the operation of a municipal incinerator because it was in violation of a state air quality implementation plan calling for it to be shut down. Ultimately, EPA approved a revision of the plan which permitted the incinerator to stay in operation. The district court had refused to grant fees for two main reasons: the incinerator was never shut down and, since EPA was already considering the proposed plan revision, "plaintiffs' efforts in this litigation did not serve to expedite the administrator's decision." 639 F.2d at 804.

The Court of Appeals rejected this logic:

> We think the district court incorrectly focused its attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision . . . quite obviously the legislature,

> when it called for citizen-suits, considered a fee recovery to be consonant with the public interest whenever the underlying suit was a prudent and desirable effort to achieve an unfulfilled objective of the Act. The attorneys' fee feature was offered as an inducement to citizen-suits, which Congress deemed necessary; and if the hope Congress had for such suits is to become the reality, decisions on fee-allowance cannot make wholesale substitutions of hindsight for the legitimate expectations of citizen plaintiffs. 639 F.2d at 804.

The court noted that, although the plaintiffs' litigation did not in fact yield "actual and tangible effects", they had a "well-founded expectation" at the time the suit was brought that it would succeed. Thus, the lower court should not have refused automatically to grant fees.

Several other opinions from the D.C. Circuit Court of Appeals have endorsed the rationale of the lower court case. See, *e.g., Alabama Power Co. v. Gorsuch,* 672 F.2d 1 (1982); *Environmental Defense Fund v. EPA,* 672 F.2d 42 (1982); *Village of Kaktovik v. Watt,* ..... F.2d ..... (D.D.C. No. 81-1752, October 1, 1982). The Ninth Circuit, too, agrees with the lower court's analysis. See *Northern Plains Resources Council v. EPA,* ..... F.2d .....

Understandably, the government neglected to mention any of these cases in its brief, since they all directly contradict its position. On the other hand, it cannot cite a single authority to support its view that a non-prevailing party may never be awarded fees under § 307(f).

IV

THE GOVERNMENT'S PUBLIC POLICY ARGUMENTS ARE INACCURATE; IN ANY EVENT, THEY SHOULD BE ADDRESSED TO CONGRESS, NOT THIS COURT

The government argues (Brief, pp. 30-37) that judicial interpretation of key provisions of the Clean Air Act does not further the goals established by Congress, and hence cannot be the basis of a fee award. But, as we noted above, *Natural Resources Defense Council v. EPA*, 484 F.2d 1331, 1338, which was endorsed in the House Report, specifically stated that the "early interpretation" of the Clean Air Act by outside "watchdogs" is "desirable". The court below specifically found that the Sierra Club's participation facilitated "the prompt resolution of the important and complex issues" involved in the interpretation of a key provision of the Clean Air Act and that its participation "aided agency implementation and Congressional reevaluation of the Act". 672 F.2d at 41.

As the court below noted, the government is simply trying to read the "appropriate" standard right out of § 307 (f): "Under the government's position, there would have been no need to abandon the 'substantially prevailing' standard commonly used to guide judicial awards of attorneys' fees." 672 F.2d at 38. It is obvious that the government's real purpose here is to persuade this court to abandon the law as Congress wrote it in favor of its conception of the "public good". As we showed above, this Court may not do that.

But we emphatically dispute the government's insinuations (see, *e.g.*, Petition for Certiorari, p. 8; Brief, p. 37) that the lower court's decision will set a precedent which

will encourage ill-founded, "unproductive" litigation. In fact, awards of fees to non-prevailing parties under statutes using the "appropriate" language are likely to be quite rare. See, *e.g., Village of Kaktovik v. Watt,* ..... F. 2d ..... (D.C. Cir. No. 81-1752, October 1, 1982). In that case, the Court of Appeals refused to award fees to non-prevailing plaintiffs under provisions of the Outer Continental Shelf Lands Act (43 U.S.C. § 1349(a)(5)) and the Endangered Species Act (16 U.S.C. § 1540(g)(4)) which are virtually identical to Clean Air Act § 307(f). The court found that the plaintiffs, unlike the petitioners in this case, had not raised critical issues of national importance, nor were the legal issues novel or complex.

The Court of Appeals' opinion in the present case also emphasized that awards of fees to non-prevailing parties would be rare, limited to "exceptional" cases. 672 F.2d at 39. Therefore, the government's fears of a rash of fee awards to parties who did not prevail in trivial lawsuits is completely unfounded.

There is another, practical reason why the lower court's opinion will not open the floodgates to ill-conceived litigation. This Court has made it plain that, as a general rule, a party must participate in agency rule-making and advance all of its arguments at the administrative level as a prerequisite to judicial review. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 553-54 (1978). This is especially true under § 307 of the Clean Air Act. See *American Petroleum Institute v. Costle,* 615 F.2d 1176, 1190-91 (D.C. Cir. 1981), cert. *den.* 102 S. Ct. 1737 (1982). Such administrative ac-

tion, which is likely to be immensely time-consuming,[11] is *not* compensable under § 307(f). See *Sierra Club v. Gorsuch*, 672 F.2d 33. Thus, potential litigants with doubtful claims are unlikely to be tempted into embarking upon the long and expensive process of challenging major administrative action on the slim hope that they might recover attorney's fees for the judicial portion of the litigation even if they lose.

CONCLUSION

The government does not challenge the Court of Appeals' conclusion that the issues in this case were extraordinarily complex and important and the calibre of the submissions by the petitioners was exemplary. Nevertheless, it argues that the court below erred, since fees may never be awarded to a non-prevailing party under §307(f). This absolutist view of the law flies in the face of the specific language of the statute, the unambiguous legislative history, and a long string of judicial opinions. The Solicitor-General asks this court to usurp the functions of Congress by re-writing the statute to conform to his views of public policy. This court should firmly reject this invitation to act as a super-legislature.

Oakland, California; January 7, 1983.

Respectfully submitted,

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[11]For example, in the present case, the Sierra Club originally sought fees for a total of 1,104.5 hours, representing its efforts in the underlying judicial and administrative proceedings. See Motion for an Award of Attorneys Fees, filed May 12, 1981. However, the final award by the court was for only 406.5 hours, of which 42.5 hours were spent on the attorneys fees issue. See Sierra Club v. Gorsuch, 684 F.2d 972, 973-74 (D.C. Cir. 1982). The Sierra Club attorneys were thus forced to expend a total of 740.5 hours on this litigation for which no compensation was available.

Supreme Court, U.S.
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No. 86-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT ENVIRONMENTAL DEFENSE FUND

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QUESTIONS PRESENTED

Section 307(f) of the Clean Air Act authorizes fee awards in litigation under that section "whenever [the court] determines such award is appropriate." The questions presented are:

(1) whether the court of appeals properly interpreted this provision in concluding that its discretion to award fees is not limited to successful or prevailing parties; and

(2) whether, on the facts of this case, the court abused its discretion by basing its fee award on specific findings that the litigation advanced the objectives of the Clean Air Act.

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STATEMENT

This case involves separate awards of attorney fees to the Environmental Defense Fund (EDF) and the Sierra Club under section 307(f) of the Clean Air Act ("the Act"), 42 U.S.C. § 7607(f) (Supp. IV 1980), in litigation involving the validity of regulations[1] issued by the Environmetnal Protection Agency (EPA) under the Act. The court of appeals awarded fees to EDF because its efforts in the litigation had furthered the objectives of the Act in several specific ways. The court found that litigating the questions raised by EDF clarified the law regarding important, novel and complex issues under the Act and that its decision provided guidance to EPA and the executive branch. The court of appeals emphasized EDF's "exemplary" performance in assisting and educating it concerning the questions involved. The court also found that EDF's participation caused EPA to reveal important information which had not previously been made available to the public or the parties. To evaluate these findings, it is necessary to consider the underlying merits litigation and its background.

The regulations in issue were new source performance standards (NSPS) which established nationally-applicable limitations for emissions of pollutants from new or modified coal-fired electric generating plants. Those regulations are important in several respects. The pollutants regulated by the NSPS are known to cause or contribute to respiratory illnesses and are emitted in millions of tons by coal-fired generating plants each year. The projected costs of complying with the revised NSPS were estimated as tens of billions of dollars. In addition, the rulemaking had important implications for the future development and use of coal resources in the United States and the feasibility of using coal from eastern states, which generally has higher sulfur content.

The comment period for the rulemaking closed on January 15, 1979. After that date, during the final stages of the rulemaking, EPA received written comments and

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[1] 44 Fed. Reg. 33580 (June 11, 1979), 40 C.F.R. Part 60 (1981).

engaged in nine private meetings with representatives of the coal industry, the majority leader of the Senate and other representatives of Congress, and officials of the executive branch, including the President himself. EDF challenged the NSPS primarily on the basis of these "*ex parte*" communications. Two of these meetings were never recorded in the rulemaking docket: a meeting with the President on April 30, 1979, and a meeting with Senate staff on May 1, 1979. EDF learned of these meetings by obtaining the calendar of an EPA official pursuant to the Freedom of Information Act.

In its petition for review of the regulations, EDF challenged the propriety of EPA's actions under the recently enacted procedural requirements of section 307 of the Act and the due process clause of the Fifth Amendment. Thereafter, EDF filed a motion for discovery with respect to the *ex parte* contacts. In response, EPA opposed all discovery on the basis that the court of appeals' review was limited to the administrative record, as defined by the Act, and categorically asserted that all intra-executive branch communications, both written and oral, were excluded from that record.[2] With respect to the other *ex parte* contacts, EPA contended that the summaries of meetings placed in the record were sufficient,[3] although the text of one such summary is only 32 words long (J. App. at 17), and the court characterized another as "not very informative." *Sierra Club I*, 657 F.2d at 389. EPA also acknowledged that it had decided not to reduce all oral interagency communications to writing for the rulemaking record.[4]

On June 16, 1980, the court of appeals ordered EPA to submit affidavits providing information about all but one of the meetings specified in EDF's motion. J. App.

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[2] Respondents' Memorandum in Opposition to Motion for Leave to Obtain Discovery, filed May 1, 1980, *EDF* v. *Costle*, No. 79-1874 (D.C. Cir.), *consolidated with Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. 1982) (hereafter *Sierra Club I*).

[3] *Id.* at 7.

[4] *Id.* at 14-15.

24-25. The court ordered EPA to identify the participants in the meetings and to describe how the meetings came to be held and their approximate length. *Id.* EPA submitted some of the information requested by EDF,[5] whereupon EDF pointed out the lack of documentation concerning certain of the meetings, including the meeting with the President, and renewed its request for information.[6] Before the court ruled on that request, EPA "voluntarily" submitted affidavits providing information concerning the undocumented meetings. J. App. 26-29. The information disclosed as a result of EDF's discovery requests provided the factual basis for the court of appeals' resolution of the issues presented in this case; the affidavits required of EPA are frequently cited in the court's opinion on the merits.[7]

With respect to the propriety of the *ex parte* meetings and EDF's request for further discovery, EPA took the position that communications within the executive branch are generally confidential and that nothing in the Clean Air Act altered that rule. Brief for Respondents at 144-45. EPA repeatedly asserted that such communications were categorically excluded from the record for review, regardless of when they occurred. *Id.* at 145, 147, 173, 179. Accordingly, EPA suggested that all those communications "are not properly before this court."

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[5] In its discovery request, EDF identified two meetings on April 30, 1970, a meeting at 10 A.M. with the President and others, J. App. at 19, and a meeting with White House staff at 2:30 P.M., J. App. 15, 17. The court of appeals ordered EPA to submit affidavits to identify the meetings "by date with reference to the petitioner's motion. . . ." J. App. at 25. EPA submitted information pertaining only to the afternoon meeting, apparently because it "assumed" that EDF was not interested in documentation of the meeting with the President, arguing that EDF's Motion did not refer to it, although EDF's supporting Memorandum did. J. App. at 26-27, 19.

[6] Brief for Petitioner Environmental Defense Fund at 43-48, 76-88.

[7] *E.g.*, *Sierra Club I*, 657 F.2d at 387 n.429, 388 n.439, 388 n.441, 389 nn.443-44, 389 n.446, 390 n.451.

Id. at 146. In its ruling on this aspect of the case, the court of appeals pointed out that the Clean Air Act did not address the question. 657 F.2d at 400. However, the court rejected the agency's broad claim of executive branch confidentiality, inferring that the Act required even oral communications to be docketed, regardless of the time at which they occur, if they are of central relevance to the rulemaking. Based on the affidavits which EPA had been required to submit, the court was able to determine that none of the undocketed meetings met that standard and accordingly the regulations were upheld. The court pointed out, however, that executive branch personnel are not exempt from the requirement that all written materials, including inter-agency communications, received from "any person" during the comment period must be placed in the docket. 657 F.2d at 405 n.519 (construing 42 U.S.C. § 7607(d)(4)(B)(i)). Thus, the court indicated that even inter-agency review documents are made part of the record for judicial review by 42 U.S.C. § 7607(d)(7)(A),[8] contrary to EPA's broad assertion of privilege.

With respect to EDF's request for further discovery, the court ruled that it was unnecessary because EPA had already been required to disclose much, if not all, of the information EDF sought. 657 F.2d at 390 n.450. Similarly, with respect to EDF's motion to supplement the record, the court observed that the documents in question "have already been lodged and examined by us during our review of EDF's procedural claims," and accordingly held that it was unnecessary to supplement the record formally. *Id.*

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[8] This is apparent since the court's observation is made as a counterpoint in a discussion of the Act's failure to include inter-agency review documents, as such, in the judicial review record. *Sierra Club I*, 657 F.2d at 404-05 n.519. Although the court was not explicit, the statute makes clear that inter-agency written materials which are included in the record on the ground that they are written materials received from "any person," 42 U.S.C. § 7607(d)(4)(B)(i), *are* part of the record for judicial review. 42 U.S.C. § 7607(d)(7)(A).

Shortly before the court of appeals issued its opinion on the merits in this case, on February 17, 1981, President Reagan signed Executive Order 12291[9] providing for oversight of agency regulatory actions by the Task Force on Regulatory Relief and the Office of Management and Budget (OMB). Although the Executive Order provides for submission of proposed and final rulemaking documents to OMB and provides for OMB comments thereon, it generally does not address the question whether such communications should be reflected in the agency rulemaking record.[10] Shortly after the court of appeals addressed that issue in its opinion in this case, the Director of the Office of Management and Budget issued a memorandum setting forth guidance concerning the question. J. App. at 30-31. The "Stockman Memorandum," issued on June 11, 1981, was directed to all departments and agencies of the executive branch. It explains how factual materials received from the public or developed within OMB or the Task Force on Regulatory Relief will be handled when they relate to an agency informal rulemaking. Under the procedures announced in the Memorandum, members of the public submitting information to OMB will be reminded that the information should also be submitted to the agency in question and that such agencies should place those materials in the rulemak. g record. In addition, factual materials developed wi in OBM will be docketed in the rulemaking record when submitted to an agency. At its conclusion, the Memorandum points out that the procedures adopted are consistent with "the holding of and policies discussed in *Sierra Club* v. *Costle*. . . ." J. App. at 31. The de-

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[9] 46 Fed. Reg. 13193, 3 C.F.R. § 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 136-38 (1981).

[10] The only possible exception is a provision requiring agencies to withhold promulgation of final rules until the views of the Director of OMB with respect to the rule have been included, with the agency's response, in the "rulemaking file." *Id.* § 3(f)(2), 3 C.F.R. at 130. However, that provision is inapplicable to rulemakings under judicial or statutory deadline. *Id.* §§ 3(f)(2), 8(a)(2), 3 C.F.R. at 130, 133.

cision in this case is the only legal authority cited in the Memorandum.

Following the court's opinion on the merits of this litigation, EDF and the Sierra Club filed motions seeking awards of attorney fees and costs, relying on section 307(f) of the Clean Air Act. The Justice Department, representing EPA, then engaged in settlement discussions with EDF and the Sierra Club concerning the size of an appropriate award. Although EDF reached a negotiated settlement with counsel for EPA,[11] that settlement dissolved when, in the summer of 1981, the government adopted a new policy of blanket opposition to attorney fee awards to non-prevailing parties. On February 5, 1982, the court ruled, contrary to EPA's contentions, that attorney fees could be awarded to non-prevailing parties and that an award was appropriate in this case. Petition for Writ of Certiorari (hereafter Pet.) at 1a; *Sierra Club* v. *Gorsuch*, 672 F.2d 33 (1982) (hereafter *Sierra Club II*). On July 16, 1982, following unsuccessful settlement negotiations, the court issued its ruling fixing the amount of the fee awards. Pet. at 23a; *Sierra Club* v. *Gorsuch*, 684 F.2d 972 (1982).

SUMMARY OF ARGUMENT

I. The court of appeals had clear authority to grant EDF's fee application in this case even though it upheld the regulations which EDF challenged. Section 307(f) of the Clean Air Act empowers the court to award attorney fees "whenever it [the court] determines that such award is appropriate." 42 U.S.C. § 7607(f) (Supp. IV 1980). The court's discretion to make fee awards is not limited

[11] In the court of appeals, EPA conceded that EDF had reached an agreement with the government which was subsequently rejected by the Assistant Attorney General. Reply to Oppositions of the Sierra Club and the Environmental Defense Fund to the United States' Motions for Leave to File Out of Time and for Enlargement of Time to Respond to Motions for Award of Attorneys Fees at 2, filed as Appendix A to Reply Brief for the United States on the Issue of Attorney's Fees for Losing Parties under 42 U.S.C. 7607 (F) [sic], filed December 7, 1981.

by the outcome of the underlying litigation. Rather the determination of an "appropriate" circumstance is governed by whether the litigation assisted in proper implementation and administration of the Act or otherwise served the public interest. Hence, fee awards are not restricted to "prevailing" or "successful" parties. This interpretation is confirmed by *every* source of authority: (a) the plain meaning of the statutory language, (b) the legislative history and judicial construction of section 307(f), and (c) the legislative history and case law interpretation of similar statutory provisions. The doctrine of sovereign immunity has no bearing on this case, since it has been waived expressly and the congressional intent is clear. By contrast, the government's current position, that the statute limits fee awards to "successful" parties, has no authoritative support whatsoever.

II. The court of appeals did not abuse its discretion by awarding fees to EDF. To find an abuse requires a clear showing that no reasonable person could reach the same result on the given facts. Here the court issued its award after analyzing the record in detail and applying standards consistent with the legislative history of section 307(f). Upon this basis, the court found that EDF had advanced two significant objectives of the Act: prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act. The record supports the court's finding and demonstrates that EDF contributed to the advancement of these statutory objectives in four ways:

(1) It helped resolve important, novel and complex issues of law. EDF's challenge to the propriety of *ex parte* communications resulted in an important development in and clarification of the law with regard to *ex parte* contacts and presidential involvement in the regulatory process. EDF's challenge brought about resolution of several close questions of interpretation for future rulemaking under the Act.

(2) It forced important public disclosures of factual information. Because of EDF's persistent demands for

document production from EPA, the agency was compelled, over vigorous objection, to produce for the court's scrutiny important information which was essential to a full and fair review of the regulations. The production and review of this information was significant because of the subject matter disclosed and the rejection of EPA's broad claim of executive branch confidentiality.

(3) It provided balanced representation of competing interests in the litigation and assisted the court by "exemplary performance." The court found it "absolutely essential" in this case to have articulate spokesmen for environmental as well as industrial interests, especially when dealing with controversial considerations of public policy. Without EDF's substantial contribution "the process of judicial review might have been fatally skewed." Pet. at 18a; 672 F.2d at 41.

(4) Because of the issues EDF raised, the court's decision gave important guidance to EPA and the executive branch. As a direct result of EDF's challenge, the Office of Management and Budget ordered that regulatory reform procedures under Executive Order 12291 be consistent with the holding in this case. The government's position was clearly affected by the efforts of EDF in this litigation.

EDF's efforts clearly both assisted in the proper implementation and administration of the Act and served the public interest. Inasmuch as other courts have granted attorney fees based on similar considerations, there is nothing radical or revolutionary in the court's decision. Moreover, each of these findings is factually supported by the record and directly related to the goals of the Act. Accordingly, the court did not abuse its discretion; the decision to award fees should be affirmed.

III. If this Court determines that the court of appeals applied an incorrect legal standard, the matter should be remanded to the court of appeals with appropriate guidance.

ARGUMENT

I. THE CLEAN AIR ACT CONFERS DISCRETION ON THE COURTS TO MAKE ATTORNEY FEE AWARDS, WITHOUT RESTRICTION TO "PREVAILING" OR "SUCCESSFUL" PARTIES.

In this case, EPA seeks reversal of a discretionary award of attorney fees to respondents Sierra Club and EDF under section 307(f) of the Clean Air Act (the "Act"), 42 U.S.C. § 7607(f) (Supp. IV 1980), which provides, in relevant part:

> "In any judicial proceeding under this section, the court *may* award costs of litigation (including reasonable attorney . . . fees) *whenever it determines that such award is appropriate.*"
>
> 42 U.S.C. § 7607(f) (Supp. IV 1980) (emphasis added).

Section 307(f) is one of numerous attorney fee award provisions enacted by Congress.[12] As this Court noted in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975),[13] those provisions vary considerably in their terms, and

> "[U]nder this scheme of things, it is apparent that the *circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.*"
>
> 421 U.S. at 262 (footnote omitted, emphasis added).

Most fee award statutes explicitly require a party to "prevail"[14] or to have maintained a "successful ac-

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[12] The provisions are collected in Congressional Research Service, *Awards of Attorneys Fees by Federal Courts and Federal Agencies* (Jan. 28, 1981).

[13] In that case (hereafter cited as *Alyeska*), this Court reversed an award of attorney fees for lack of statutory authorization.

[14] *E.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988; Voting Rights Act of 1965, 42 U.S.C. § 1973 *l* (e); Interstate Commerce Act, 49 U.S.C. § 11708(c); Commodities Futures Trading Commission Act of 1974, 7 U.S.C. §§ 18(f), (g).

tion," [15] in order to recover fees. In a few other statutes, including section 307(f), Congress expanded the "range of discretion . . . in making these awards" to cases where the courts determine fee awards to be "appropriate." [16] While such an exercise of discretion is subject to review for abuse, the statutory standard for awarding fees does not require the fee applicant to have "succeeded" or "prevailed."

A. The Plain Language of Section 307(f) Authorizes an Award of Fees.

The starting point in interpreting a statute is the language of the statute itself. *Diamond* v. *Diehr*, 450 U.S. 175, 182 (1981); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Appling this axiom, section 307(f) clearly authorized the court of appeals to make an award of fees in this case. That section unambiguously provides for fee awards "whenever" the court "determines" an award is "appropriate." These words of the statute are to be read according to their ordinary, contemporary, common meaning. *Diamond* v. *Diehr*, 450 U.S. at 182; *Perrin* v. *United States*, 444 U.S. at 42; *United States* v. *Pfitsch*, 256 U.S. 547, 551 (1921); *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U.S. 184, 199 (1913). Moreover, in construing a statute, every word used by Congress should be given effect. *Reiter* v. *Sonotone Corporation*, 442 U.S. 330, 338-39 (1979); 2A Sands, *Sutherland Statutory Construction* § 46.06 (4th ed. 1973).

The relevant dictionary definition of "whenever" is "At whatever time; no matter when . . . ." [17] The definition of "determine" is "To fix conclusively or authoritatively; . . . to decide by authoritative or judicial sentence . . . ." [18] The definition of "appropriate" is "Specially suitable; fit;

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[15] Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(2); Right to Financial Privacy Act, 12 U.S.C. §§ 3417(a)(4), 3418; Jeweller's Hallmark Act, 15 U.S.C. § 298(c).

[16] See note 34, *infra*.

[17] *Webster's New Internatioanl Dictionary*, 2910 (2d ed. 1934).

[18] *Id.* at 711.

proper." [19] Thus, fee awards are authorized, by the terms of section 307(f), at whatever time the court decides that such an award is suitable, proper or fitting. The statute imposes no other prerequisites, although the court's determination must, of course, have a basis in the record and is reviewable for an abuse of discretion.[20]

Nonetheless, EPA contends that section 307(f) contains an implicit restriction which turns on the outcome of the litigation.[21] Although the agency's brief never settles upon a single statement defining the term "appropriate," [22] it does contend that a fee award is not "appropriate" when the applicant is "totally unsuccessful," as it characterizes Sierra Club and EDF to have been in this action. Pet. Brief at 2. In sum, EPA would apparently require a fee applicant to be successful in some sense, irrespective of any finding by the court that an award is "suitable" or in the public interest. Such a restriction is notably absent from the statutory language.

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[19] *Id.* at 133.

[20] Where permissive statutory language is present, fee awards have been recognized as properly within the discretionary domain of the court of first instance. *Alyeska*, 421 U.S. 240, 260-62 (1975); *Copeland* v. *Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (*en banc*); *Carr* v. *Blazer Financial Services, Inc.*, 598 F.2d 1368, 1370 (5th Cir. 1979); *cf. Pete* v. *UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1289 (D.C. Cir. 1975).

[21] Petitioner's Brief (hereafter "Pet. Brief") at 9, 20-22, 28, 30.

[22] EPA sets out, or at least approves of, seven different definitions of "appropriate": (1) when a party "succeeded in correcting a violation of the Act but did not obtain a final judgment," Pet. Brief at 9; (2) when parties "accomplish a tangible pollution control benefit short of judgment," *id.* at 20; (3) "a party must at least not lose," *id.* at 21; (4) when a party achieves "abatement without final judgment," *id.*; (5) in "litigation that promotes 'proper implementation of the Act,'" *id.* at 25; (6) when parties are "successful plaintiffs or . . . plaintiffs who accomplish something concrete short of judgment," *id.* at 26; and (7) when parties achieve "some measure of success," *id.* at 30. In addition to one, some, or all of these, EPA contends that the applicant must also "contribute to the goals of the Act." *Id.*

B. The Context of Section 307(f) Within the Act Suggests No Restriction of Fee Awards to "Successful" Parties.

Where a particular word or phrase appears in one part of a statute, but has been omitted from another which was contemporaneously enacted, it is reasonable to infer that the omission was intentional. 2A Sands, *Sutherland Statutory Construction* § 46.05 (4th ed. 1973). A comparison of section 307(f) with section 322 of the Act, 42 U.S.C. § 7622, suggests that Congress deliberately omitted any "success" limitation on the award of attorney fees under section 307(f). Section 322 provides a mechanism to prevent retaliation against employees who testify in or commence proceedings under the Act or who assist in any action to carry out the purposes of the Act. Any employee who believes he has been the subject of retaliation may file a complaint with the Secretary of Labor, who is authorized to investigate the charges and order appropriate relief. Section 322(b)(2)(B) provides that the Secretary "shall" award attorney fees to the complaining employee if a remedial order is issued, plainly requiring the employee to have obtained a favorable order in order to be eligible for a fee award. By contrast, however, if such an employee later seeks judicial enforcement of the order, the court is authorized to award fees "whenever the court determines such award is appropriate." 42 U.S.C. § 7622(e)(2). Thus Congress chose to limit the discretion of the Secretary of Labor to award fees to successful complainants only, but omitted any such limitation from judicial enforcement proceedings.

Both these fee award provisions were enacted at the same time as section 307(f), the provision involved in this case.[23] The contemporaneous enactment of these provisions strongly suggests that Congress deliberately

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[23] Section 304(d), 42 U.S.C. § 7604(d), is also an attorney fee provision and also contains an "appropriate" standard. It was not, however, enacted contemporaneously with section 307. See discussion *infra* at 18-22.

omitted any "successful" party limitation from section 307(f). It is well established that a statute should not be interpreted so as to insert a term which Congress has deliberately omitted, especially where that term has been included in other provisions of the same statute. *Fedorenko* v. *United States*, 449 U.S. 490, 513, 513-14 n.35 (1981); *Federal Trade Commission* v. *Simplicity Pattern Company*, 360 U.S. 55, 66-67 (1959); *Carey* v. *Donohue*, 240 U.S. 430, 436-37 (1916); *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). Accordingly, section 307(f) should not be interpreted to impose a "successful party" limitation.

C. The Legislative History Confirms the Absence of a "Successful" Party Limitation.

The 1977 legislative history[24] of section 307(f) indicates clearly that Congress intended to authorize the

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[24] To bolster its legislative history argument, the agency resorts to fee award proposals considered by other congresses, with radically different structures. See Pet. Brief at 35-36 and 35 n.23. Given the wide variety in congressionally enacted fee award statutes, EPA's brief does nothing more than establish that these provisions "differ considerably among themselves." *Alyeska*, 421 U.S. at 261.

EPA refers to the legislative history of the Equal Access to Justice Act in support of its position that awards of attorney fees to a non-prevailing party is so unusual as to be improper. Pet. Brief 14 n.6. EPA refers to a provision in an early version of that Act which allowed for awards of attorney fees to non-prevailing parties if the court found the award to be "in the interest of justice." It then stated:

> "This provision was deemed a 'radical' and 'unacceptable' departure from current law . . . and was eliminated from the bill prior to hearing."
>
> Pet. Brief at 14 n.6.

What EPA fails to state is that the party who "deemed" the provision unacceptable was not a member of Congress, but a representative of the Department of Justice, which represents EPA in this litigation. The comment was made by Paul Nejelski, Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice. Examination of the full passage indicates that the witness stated that the proposal would constitute "a radical, and,

courts to make discretionary fee awards without a restriction based on the outcome of the litigation. In 1976 and 1977, Congress consciously selected the current statutory provision over a proposed alternative which would have restricted fee awards to parties who "prevailed" or "prevailed in part." Significantly, by 1977 those terms had been so generously construed that adoption of the limiting terms would have provided essentially the same standard for which the government now contends. When Congress rejected those proposed limitations it rejected the position now advanced by EPA.

In 1976 the Senate passed a bill, S.3219, which contained the following provision:

> "In any judicial proceeding under this Act in which the United States or an officer or employee thereof is a party (other than as an intervenor), any party other than the United States which *prevails* in such action shall recover from the United States the reasonable costs for such party's participation in such proceeding, including reasonable attorney's fees, expert witness fees, and the costs of any studies, analyses, tests, or engineering reports that the court finds were necesasry to litigate such action. In any case

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in our view, unacceptable departure from the current law." Even more serious is the Justice Department's omission from its brief of the following statement from the testimony:

> "While *we are not prepared to say that awarding legal fees to a losing party can never be justified*, we think that such a provision amounts to an invitation to spurious litigation, particularly in view of the breadth of the phrase 'in the interest of justice.'"
>
> *Equal Access to Courts: Hearings on S.2354 Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary*, 95th Cong., 2d Sess. 31 (1978) (emphasis added).

Not only has the Department of Justice cited its own view of the disputed issue as authoritative, it has seriously distorted even its own views, since it conceded that "awarding legal fees to a losing party" might be justified in some cases. *Id.*

> in which such party *prevails in part*, the court shall have discretion to award such reasonable costs." [25]

The House, however, passed a bill with a provision identical to the version of section 307(f) finally enacted, and in the Conference Committee the House version prevailed. H.R. 10498, 94th Cong., 2d Sess. § 311(c) (1976), *reprinted in* Legislative History at 6071; H.R. Rep. No. 94-1742, 94th Cong., 2d Sess. 115-16 (1976), *reprinted in* Legislative History at 4400-01.

Because the 1976 Conference Committee amendments did not pass during the 94th Congress, various bills were reintroduced the following January, including H.R. 6161 in the House and two bills introduced in the Senate, S. 252 and S. 253. H.R. 6161 and S. 253 both provided that the court "may" award attorney fees "whenever it determines that such award is appropriate." H.R. 6161, 95th Cong., 1st Sess. § 305(b) (1977); S. 253, 95th Cong., 1st Sess. § 36 (1977), *reprinted in* Legislative History at 3817. S. 252 contained a fee award provision identical to the version rejected by the Conference Committee in the preceding Congress. S. 252, 95th Cong., 1st Sess. § 36 (1977), *reprinted in* Legislative History at 3644. The Committee which considered S. 252 reported it to the Senate floor, where it was eventually adopted. Before adoption, however, it had been amended so that its attorney fee provision was made identical to the current version of section 307(f). 123 Cong. Rec. 18514, 18516, 18528 (1977). Thus, once again Congress rejected the proposed limitation on fee awards under section 307(f).

The provision rejected by Congress would have limited awards to prevailing parties and parties who "prevail in part." The rejection of the narrower provision evinced Congress' intent to confer discretion to award fees even where the potential recipient did not "prevail in part."

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[25] S.3219, 94th Cong., 2d Sess. § 35 (1976), *reprinted in A Legislative History of the Clean Air Act Amendments of 1977*, Ser. No. 95-16, 95th Cong., 2d Sess. at 4689 (1978) (hereafter "Legislative History") (emphasis added).

The significance of that choice is emphasized by the broad interpretation which the phrase "prevailing party" had, by 1977, received in the courts. EPA concedes that it had been construed to include parties who "prevail" by settlement rather than by litigated judgment, Pet. Brief at 20-21 & n.13, and that interpretation was confirmed by this Court in *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). Even before 1977, several courts had awarded fees to parties who received little or none of the relief claimed, even under "prevailing party" standards. *See, e.g., Reed* v. *Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969). *See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 891-93 (1975). It is unnecessary in the present case to resolve whether those cases properly interpreted the term "prevailing party" because that standard is absent from the Clean Air Act and its interpretation is not involved in this case. The cases cited are indicative, however, of the broad interpretation given to the standard. Hence, Congress' deliberate rejection of any form of "prevailing party" limitation for section 307(f), despite the expansive interpretation already given that term, indicates its intent to confer broad authority on the courts to make discretionary fee awards.

Two House Reports which accompanied the 1977 Amendments support the court of appeals' interpretation of section 307(f) and undermine EPA's position. Both state:

> "In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act *or otherwise serve the public interest.* The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing

> party.' In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 (1st Cir. 1973)." [26]

These Reports expressly rejected any limitation on fee awards to the "prevailing party." They explicitly state that the "purposes of the authority to award fees" are to "assure proper implementation and administration of the act or otherwise serve the public interest." Every court which has interpreted section 307(f) or similarly-worded provisions has considered and implemented these purposes in reaching a fee award decision. See pp. 20-23, 26-27, *infra*. Similarly, in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 415-16 (1978), this Court recognized, in another statutory context, that discretionary fee award provisions "entrust . . . the effectuation of statutory policy to the discretion of the . . . courts."

The court of appeals' rationale for rejecting any "prevailing party" limitation in this case finds further support in the case cited by the House Reports, *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) [hereafter cited as *NRDC* v. *EPA*]. In that case, the court held that a fee award was "appropriate" under section 304 for a party which only partially prevailed. However, the court's rationale, which the House Reports expressly adopted, is far broader:

> "The authorizing language of § 304(d) permits an award 'to any party, whenever the court determines such award is appropriate.' . . . *We are at liberty to consider not merely 'who won' but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals.* When the government is attempting to carry out a program of such vast and

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[26] H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 277 (1976); H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804 (1979) (emphasis added).

> unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service."
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> 484 F.2d at 1338 (emphasis added).

Thus the court recognized that the fundamental purpose for fee awards under the Clean Air Act is "to encourage the achievement of statutory goals." The central point, reflected in both the quoted passage and the House Reports which cited it, and conspicuously avoided by EPA (Pet. Brief at 27-28), is that fee awards are to be based on whether the litigation was "in the public interest." H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 277 (1976); H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804.

The 1970 legislative history with respect to the enactment of section 304(d) of the Clean Air Act also supports the court of appeal's interpretation of section 307(f) in this case. In fact, it flatly contradicts EPA's theory that fee awards under section 304(d) are limited to "successful" parties. Pet. Brief at 20. In describing section 304(d), the Senate report concisely states the governing principle as follows:

> "The court may award costs of litigation to either party whenever the court determines that such an award is in the public interest *without regard to the outcome of the litigation.*"
>
> S. Rep. No. 91-1196, 91st Cong., 2d Sess. 65 (1970) (emphasis added).

This report accompanied a bill in which the fee award provision provided that the court might award attorney fees whenever it determined that an award would be "in the public interest." S. 4358, 91st Cong., 2d Sess. § 304 (1970). At another point, the same report states that under section 304, "the courts may award costs of litigation, including reasonable attorney and expert witness

fees, whenever the court determines that such action is in the public interest." S. Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970). These repeated statements of the operative standard directly contradict any suggested limitation of fee awards to "successful" parties.

If, for the sake of argument, it were true that Congress in 1970 intended fee awards to be limited to "successful" parties, the 1977 legislative history indicates that the 95th Congress intended no such restricted standard to apply under section 304(d) or section 307(f). In fact, EPA's argument that Congress intended section 307(f) to be no broader than section 304(d) has no support.[27] Moreover, even if Congress intended section 307(f) to parallel section 304(d), that is because Congress, in 1977, recognized that section 304(d) had been broadly construed and chose to endorse that judicial interpretation, rejecting a proposed limitation of section 304(d) to parties who "prevail" or "prevail in part."

In 1977, the staff of the Senate Committee on Environment and Public Works compared the two Senate bills introduced in that year. The Report noted that the attorney fee provision of S. 252, quoted above, would have limited fee awards to those who prevail or prevail in part and would have applied to "any judicial proceeding under this Act." See text quoted at pp. 14-15. This would have included citizen suits under section 304,[28] as well as

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[27] The only support cited by EPA for its contention is a passage from a Senate report, quoted in the government's brief at page 17, which merely states that the committee had originally intended to provide a fee award provision in § 307 in 1970 and was, in 1977, responding to court decisions which held that fee awards could not be made under that section absent statutory authorization. Indeed, in describing the operative standard of § 307(f), that a court "*may* in its discretion, award costs of litigation to a party *bringing a suit* under section 307," S. Rep. No. 95-127, 95th Cong., 1st Sess. 99 (1977) (emphasis added), the committee expressed a standard which is broader than that advanced by the government in this case.

[28] This is confirmed by the Report's description of the proposal. See Staff Of The Subcommittee On Environmental Pollution Of The Committee On Environment And Public Works, 95th Cong., 1st

the new provision of section 307(f). Thus, S. 252 would have restricted the existing fee award provision of section 304, which was originally enacted to authorize fee awards "in the public interest without regard to the outcome of the litigation."[29] In light of these proposed restrictions, the Report notes that one area of controversy related to the provision was:

> "Is there any need to modify *the existing judicial practice of awarding fees based on the individual circumstances of each case?*"
>
> Staff Report at 37, *reprinted in* Legislative History at 3893 (emphasis added).

The Senate Committee thus squarely faced the issue presented in this case: should the courts' discretion to award fees be limited to parties who "prevail in part," or should the courts continue to award fees "based on the individual circumstances of each case?" By rejecting any proposed limitation on section 304 and leaving that section unchanged, Congress endorsed the "existing judicial practice."

The judicial practice which Congress approved is reflected by two district court opinions which specifically rejected the contention here advanced by EPA that "success" is a prerequisite to a fee award. In *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), *aff'd mem.*, 510 F.2d 969 (3rd Cir. 1975), the court considered an application for attorney fees by a citizens' group which had challenged unsuccessfully the defendant's right to emit sulfur dioxide above certain levels. In concluding that an award of fees was not appropriate under section 304 of the Act, the court observed that a limitation of awards to a prevailing party was "notably missing" from the Act and concluded that "ultimate success in a citizen's suit was not intended

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Sess., *A Section-By-Section Analysis Of S.252 And S.253 Clean Air Act Amendments* 37 (Comm. Print 1977), *reprinted in* Legislative History at 3893 (hereafter "Staff Report").

[29] S. Rep. No. 91-1196, 91st Cong., 2d Sess. at 65 (1970).

to be a prerequisite to an award." 62 F.R.D. at 355. Although the outcome of the case was a relevant factor, the court concluded that, in exercising its "equitable judgment," it could and should award fees to a losing party if the litigation "served the objectives of the Act in some substantial way . . . ." *Id.* The court concluded that a fee award was not appropriate on the facts of the case because the suit had not induced the defendant to act in some way which benefited the public, nor had it "in any other tangible or direct way contributed to achievement of the objectives of the Clean Air Act." *Id.* Thus, although it reached a different conclusion on the facts of its case, the court in *Delaware Citizens* interpreted section 304 in the same manner as the court of appeals herein.

In *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *modified*, 535 F.2d 1318 (D.C. Cir. 1976) (reversed as to award of attorneys' fees for lack of jurisdiction), plaintiffs sought to prevent completion of two private construction projects on the Georgetown waterfront in an action brought under section 304 of the Act. Although plaintiffs were unsuccessful in their suit, the court concluded that the case was "an exceptional case" in which a fee award was appropriate. The court reviewed the statutory language and legislative history and reasoned that "success or failure on the merits has nothing to do with the trial court's *power* to award costs and attorneys' fees in citizen suits under the Clean Air Act." 383 F. Supp. at 144 (emphasis in original). Accordingly, the court concluded that "an award is appropriate if the suit has benefited the public interest as declared in the Clean Air Act." *Id.* The court further reasoned that "the advancement of an important legislative policy may justify the award of costs and fees even where the plaintiff does not obtain the ultimate relief he seeks." *Id.*

These decisions are squarely in line with the court of appeals' decision in this case and directly contrary to EPA's position. Congress' endorsement of them, together with its rejection of limiting language for both sections 304(d) and 307(f), renders EPA's position untenable. It is immaterial what section 304(d), which is not involved in this case, was originally intended to mean. When Congress enacted section 307(f) in 1977 it intended to confer discretion on the courts to award fees without limitation to "successful" or "prevailing" parties.

D. The Court of Appeals' Interpretation Has Been Confirmed by Every Federal Court to Address the Question.

Every federal court to consider the issue has concluded that Congress did not intend to restrict fee awards under the Clean Air Act in the manner now suggested by EPA. In convincing numbers, decisions interpreting the fee award provisions of the Clean Air Act have adopted the same interpretation as the court of appeals in this case. *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982); *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981); *NRDC* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc.*, v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), *aff'd mem.*, 510 F.2d 969 (3rd Cir. 1975); *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *modified*, 535 F.2d 1318 (D.C. Cir. 1976) (reversed as to award of attorneys' fees for lack of jurisdiction).

Each of these cases has rejected the concept, advanced by EPA here, that fee awards under sections 304(d) and 307(f) are restricted in some manner based upon the outcome of the litigation. Thus every court interpretation

of the attorney fee provisions of the Clean Air Act supports the decision of the court of appeals in this case.

E. Comparison With Other Fee Award Statutory Provisions Confirms the Court of Appeals' Interpretation of Section 307(f).

The court of appeals' decision is further supported by a comparison of that provision with other statutory fee award provisions. In the vast majority of fee award statutes, Congress has limited the discretion of the court by requiring that fees be awarded only to parties who have achieved some specified measure of success in the litigation, typically a "prevailing party," [30] a "successful party," [31] or a "substantially prevailing party." [32] Although more than 150 fee award provisions have been enacted,[33] only 20 authorize attorney fee awards whenever the court determines it to be "appropriate." [34] Although those 20 provisions are not limited to "successful"

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[30] See note 14, *supra*.

[31] See note 15, *supra*.

[32] *E.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E); Privacy Act, 5 U.S.C. §§ 552a(g)(2)(B), (g)(3)(B); Government in the Sunshine Act, 5 U.S.C. § 552b(i).

[33] See note 12, *supra*.

[34] Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2622(b)(4)(C); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (Supp. IV 1980); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (Supp. IV 1980); Clean Water Act, 33 U.S.C. § 1365(d); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4); Deep Water Port Act of 1974, 33 U.S.C. § 1515(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2) (Supp. IV 1980); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f), 7622(e)(2); Power Plant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d) (Supp. IV 1980); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d) (Supp. IV 1980); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (Supp. IV 1980).

parties, they are located in 16 statutes, some of which contain other fee award provisions[35] which all require by their terms that the fee applicant establish "a violation" or succeed in obtaining an order in his favor. Thus, a comparison with other statutory provisions indicates that one of the most unusual features of section 307(f) is the absence of any restriction based upon the outcome of the litigation.

It is well established that where a statute with respect to a subject contains a given provision, the omission of such a provision from a similar statute is significant to show that a different intention existed. *United States* v. *Wittek*, 337 U.S. 346, 365-66 (1949); *Richerson* v. *Jones*, 551 F.2d 918, 927-28 (3rd Cir. 1977); *General Electric Company* v. *Southern Construction Company*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); 2A Sands, *Sutherland Statutory Construction* § 51.02, at 291 (4th ed. 1973). Section 307(f) differs from other fee award provisions because Congress deliberately omitted precisely the kind of restriction which EPA here urges this Court to impose. This confirms the court of appeals' conclusion that the omission was deliberate and that EPA's restrictive interpretation should be rejected.

In addition to the omission of any "prevailing" or "successful" party limitation, section 307(f) is unusual in another respect. Of the many statutory fee award provisions enacted by Congress, we have found only three which authorize fee awards *at all* in judicial proceedings to review agency regulations: Clean Air Act section 307(f), Consumer Product Safety Act ("CPSA") sec-

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[35] Toxic Substances Control Act, 15 U.S.C. § 2622(b)(2)(B); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1270(f), 1275(e), 1293(c); Clean Water Act, 33 U.S.C. § 1367(c); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(2)(B)(ii); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(b)(2)(B) (Supp. IV 1980); Resource Conservation and Recovery Act, 42 U.S.C. § 6971(c); Clean Air Act, 42 U.S.C. §§ 7413(b), 7622(b)(2)(B); Outer Continental Shelf Lands Act, 42 U.S.C. § 1349(b)(2).

tion 24 (15 U.S.C. § 2060(c)), and Toxic Substances Control Act ("TSCA") section 19(d) (15 U.S.C. § 2618 (d)).[36] Section 307(f) and TSCA section 19(d) each authorize awards when the court finds it to be "appropriate" and CPSA section 24 empowers the court to award fees if found to be "in the interest of justice." None of the three provisions contains a limitation to a "prevailing" or "successful" party, although other fee award provisions in the same statutes do require that an order be issued in the fee applicant's favor or that a violation of the Act be established.[37] Moreover, all three provisions were enacted at approximately the same time and have the same general purpose. Thus, although these statutes are not directly involved in this case, their legislative histories are helpful in discerning Congress' intent with respect to section 307(f), especially in light of the striking similarities in the expressions of legislative intent. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973). The legislative histories of the TSCA and CPSA provisions both explicitly state that those provisions are to be liberally construed to effectuate their purposes and that a fee award would be appropriate "where such award is in the public interest without regard to the outcome of the litigation."[38] Thus, the court of ap-

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[36] CPSA authorizes the Consumer Product Safety Commission to issue safety rules for consumer products, violations of which can result in the removal of hazardous products from the marketplace. Under TSCA, the administrator of EPA promulgates regulations concerning the testing, manufacture, and processing of chemical substances. Although some other statutes dealing with public health and safety provide special judicial review provisions for agency promulgations, none provides for an award of attorney fees. *E.g.*, Clean Water Act, 33 U.S.C. § 1369; Resource Conservation and Recovery Act, 42 U.S.C. § 6976 (Supp. IV 1980); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(c) (Supp. IV 1980); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1276 (Supp. IV 1980).

[37] Clean Air Act, 42 U.S.C. § 7622(b)(2)(B); TSCA, 15 U.S.C. § 2622(b)(2)(B); CPSA, 15 U.S.C. § 2072(a).

[38] With respect to TSCA, see 122 Cong. Rec. 32854 (1976) (remarks of Sen. Tunney) and 122 Cong. Rec. 8300-01 (1976) (re-

peals decision in this case is directly supported by the legislative histories of the only other provisions which authorize fee awards in proceedings to review agency regulations.

The court of appeals' decision in this case is also supported by the case law under statutes other than the Clean Air Act which authorize the courts to make awards of attorney fees when found to be "appropriate." In *EDF* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), *petition for reh'g pending*, No. 79-1580 (March 1982), decided the same day as the fee award decision in this case, a different panel of the District of Columbia Circuit made an award of attorney fees to EDF under TSCA section 19(d) for partial success in litigation challenging the validity of EPA regulations. Quoting the decision in this case, the court there concluded that the statutory language on its face authorized fee awards to "prevailing, substantially prevailing, or non-prevailing parties in 'appropriate cases.'" 672 F.2d at 48. The court's interpretation was confirmed by comparison with other fee award provisions and by a review of the TSCA legislative history, in which the ranking Senate Manager on the Conference Committee stated that the fee award provision "is not restricted to plaintiffs or successful parties." 672 F.2d at 48; 122 Cong. Rec. 32855 (1976) (remarks by Sen. Magnuson).

In *Village of Kaktovik* v. *Watt*, 689 F.2d 222 (D.C. Cir. 1982), the court of appeals reversed an award of attorney fees in a citizen suit enforcement action under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (Supp. IV 1980), and the Endangered Species Act, 16 U.S.C. § 1540(g). At the outset, Judge Wilkey noted that although plaintiffs ultimately lost on all issues, "this need not bar the award of attorney's fees and costs . . . ."

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marks of Sen. Tunney). For CPSCA, see the Conference Committee Report, H.R. Rep. No. 94-1022, 94th Cong., 2d Sess. at 1025 (1976).

689 F.2d at 224. Rather, the opinion recognized that the fee award decision in the present case relied on the principle that fees were to be awarded if the litigation substantially contributed to the goals of the underlying statute. *Id.* However, the court distinguished the present case in two important respects. First, it noted that in contrast to the Clean Air Act, one of the statutes involved in *Kaktovik* had as one of its primary goals the expeditious development of offshore resources, which had been hindered, not advanced, by the plaintiffs' action. Second, the court recognized that the factual situation in the present case was "exceptional" in light of the importance, novelty and complexity of the issues raised. 689 F.2d at 227-28. Judge Wilkey reemphasized "that the mere fact that a plaintiff is *unsuccessful* should not blind a Court to the possibility that its efforts may nonetheless make an award of attorney's fees and costs appropriate. *Each case, each plaintiff must be judged individually.*" 689 F.2d at 228 (emphasis added). *See also Carpenter* v. *Andrus*, 499 F. Supp. 976 (D.Del. 1980).

F. The Doctrine of Sovereign Immunity Poses No Bar to the Court of Appeals' Award of Attorney Fees.

EPA's argument that section 307(f) does not "contain the requisite waiver of sovereign immunity" and that the doctrine of sovereign immunity "requires that Section 307(f) be strictly construed in the government's favor," (Pet. Brief at 11) has absolutely no foundation.[39] Sover-

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[39] EPA contends that "the Court of Appeals ignored the doctrine of sovereign immunity." (Pet. Brief at 11). Here the Court of Appeals did not "ignore" the doctrine of sovereign immunity. It did not *explicitly* address the doctrine because it was unnecessary for the court to do so, in view of its exhaustive discussion of the "Authority Under Section 307(f) to Grant Attorney's Fees to Non-Prevailing Parties" in Part I of its February 5, 1982 opinion. (Pet. 2a-13a, 672 F.2d at 34-39).

Significantly, this Court also "ignored" the doctrine of sovereign immunity in the same manner in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), decided on ordinary principles of statutory construction despite arguments bearing on sovereign immunity made by the government. Brief for the Respondents at 32, 33, *Chandler* v. *Roude-*

eign immunity is a defense by the sovereign that it has not consented to suit for the particular kind of claim asserted or that it did so with certain explicit procedural conditions which have not been satisfied. The case law indicates that sovereign immunity requires "strict construction" to resolve ambiguities in favor of the government in three circumstances: (1) in determining whether the court has subject matter jurisdiction to entertain a claim against the United States of the sort presented to it (*United States* v. *Sherwood*, 312 U.S. 584, 586-88 (1941); *United States* v. *King*, 395 U.S. 1, 4 (1969)); (2) in determining whether the law authorizes the court to award the particular remedy sought, if the claim is established (*United States* v. *Testan*, 424 U.S. 392, 398-402 (1976); *United States* v. *Mitchell*, 445 U.S. 535, 537-38 (1980), *on remand*, 664 F.2d 265, 267-68 (Ct. Claims 1981), *cert. granted*, 102 S. Ct. 2901 (June 7, 1982); *Army & Air Force Exchange Service* v. *Sheehan*, 102 S. Ct. 2118 (June 1, 1982)); and (3) in determining whether any express procedural conditions or limitations on the waiver have been satisfied (*McMahon* v. *United States*, 342 U.S. 25, 26-27 (1951); *United States* v. *Kubrick*, 444 U.S. 111, 117-18 (1979); *Lehman* v. *Nakshian*, 453 U.S. 156, 160-61 (1981) (dictum)).

EPA has explicitly conceded that section 307(f) constitutes a waiver of immunity for the award of attorney fees against the government and a rejection of the traditional "American Rule" against fee shifting. Pet. at 15. Thus, the government has conceded that the court of appeals had subject matter jurisdiction to entertain claims for fee awards and that, as a matter of substantive law, the court is authorized to award the remedial measure sought, *i.e.*, the fee award. Accordingly, the only remaining applicability of "strict construction" is in determining whether any procedural limitations have been satisfied.

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bush, 425 U.S. 840 (1976). *Cf. Hackley* v. *Roudebush*, 520 F.2d 108, 122 n.53 (D.C. Cir. 1975).

In this respect, section 307(f) explicitly provides only one prerequisite for a fee award: a determination by the court that an award is appropriate. Obviously that limitation has also been satisfied. Thus, all the terms of section 307(f) for which strict construction is warranted have been met.

EPA, however, would apply the strict construction principle in a new context: to restrict the substantive terms intended to guide the court's discretion. There are several serious problems with this contention. First, it is contrary to the plain meaning of section 307(f), which must be derived from reading all its words in context. EPA, however, attempts to isolate the word "appropriate" and impose upon it a "strained and unnatural" construction. *See Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976). Here the term "appropriate" can only be interpreted in context with the rest of the provision. Section 307(f) authorizes a fee award *"whenever* [the court] determines such award is appropriate." EPA would imply restrictive meaning into a provision which is expressly not restrictive. Such an argument is directly contrary to the rule enunciated by this court that, "In construing a statute, we are obliged to give effect, if possible, to every word used." *Reiter* v. *Sonotone Corporation*, 442 U.S. 330, 339 (1979).

EPA relies heavily on *Lehman* v. *Nakshian*,, 453 U.S. 156 (1981), Pet. Brief at 12, to support its argument that the word "appropriate" imposes a restrictive meaning. That case does not concern any limitation on a substantive standard, as EPA would have the court impose here. The sole question there was whether plaintiff was entitled to the procedural right to a jury trial in the determination of his claim. Moreover, in *Lehman* the statutory provision waiving sovereign immunity and authorizing actions against the government was silent as to the right to jury trial, while the section providing

a right of action against private employees was later amended to provide such a right expressly. Based on this fact, the Court concluded that it was "unnecessary to go beyond the language of the statute itself" to resolve the case. 453 U.S. at 165. The Court also found that the legislative history confirmed its reading. *Id.* at 165-68. Finally, in dictum, the majority suggested that even if the legislative history were ambiguous, plaintiff would not be entitled to a jury since sovereign immunity would require the right to a jury to be "affirmatively and unambiguously" stated. *Id.* at 168.

In the present case, both the statutory language and legislative history "affirmatively and unambiguously" indicate that Congress intended to confer discretion on the courts without limiting that discretion to "prevailing" or "successful" parties. Thus, *Lehman's* findings of a procedural condition on the waiver of sovereign immunity provides no support for EPA's attempt to narrow the substantive terms of section 307(f) in this case.

The second defect in EPA's argument is its lack of support. In section 307(f) the term "appropriate" provides a substantive standard intended to guide the court's determination. We are aware of no authority for the proposition that the principle of strict construction extends to such terms. Indeed, the case law suggests the contrary. In *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), for example, owners and insurers of a tugboat sued the United States, alleging that the negligent operation by the Coast Guard of a lighthouse caused the tug and the barge it was towing to run aground. The government moved to dismiss the case arguing that the Act implicitly excluded liability for negligent performance of uniquely governmental functions. The Court rejected that argument, construing the Act in light of the "broad and just purpose" it was designed to serve, stating:

> "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so

> finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."
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> 350 U.S. at 68.

In the present case, EPA would have the court apply a definition of "appropriate" that is "almost incapable of being held in the mind for adequate formulation."

In *Indian Towing*, the Court chose not to construe "strictly" the substantive right conveyed in the statute, stating:

> "Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. *Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.*"
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> 350 U.S. at 69 (emphasis added).

Although Congress deliberately intended to waive sovereign immunity in discretionary terms, EPA would have this Court resurrect the doctrine because the statute does not specifically address the particular factual situation here presented. Thus, EPA would "import immunity back into a statute designed to limit it."

The logical extension of EPA's argument is that all cases which did not apply such a strict construction on behalf of the government to the terms of other attorney fee statutes should be overruled. EPA cites several cases indicating that the terms of other fee award statutes, such as "prevailing party" or "substantially prevailing party," have been construed liberally, even against the federal government. Pet. Brief at 20 n.13. EPA cites these cases with no suggestion that they were decided incorrectly. Nevertheless, cases such as those making awards of attorney fees to Title VII discrimination complainants and to Freedom of Information Act plaintiffs who prevailed short of judgment were, under EPA's theory, wrongly decided because the courts did not apply the strict construction principle.[40]

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[40] *See, e.g., Parker* v. *Mathews*, 411 F. Supp. 1059 (D.D.C. 1976). *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). These and the

In fact, if the principle of strict construction did pertain to substantive standards, application of the principle would require standards for all factual determinations by the trier-of-fact to be construed in the government's favor. If that premise were correct, then in every case arising under the Federal Tort Claims Act (28 U.S.C. § 2671 *et seq.*), for example, the court would be required to construe the term "negligence" narrowly in favor of the government, but not with respect to a private codefendant. Such a result is obviously not intended by Congress.

Even if EPA's premise were correct that the term "appropriate" should be strictly construed, the discussion regarding the meaning of "appropriate" in the legislative history should satisfy any inquiry into its construction. The relevant consideration is the question of congressional intent expressed in the statute. *Federal Land Bank* v. *Priddy*, 295 U.S. 229, 231 (1935); *Eastern Transportation Company* v. *United States*, 272 U.S. 675, 689 (1927). It is well established that in construing a waiver of sovereign immunity, the statute should be read "according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *Moore*

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other cases cited by EPA (Pet. Brief at 21 n.13) all allow payment of attorney fees to plaintiffs who "prevail" short of judgment. Moreover, in *Cuneo*, the court specifically addressed the question of sovereign immunity as it related to the retroactivity of the attorney fees provision of the Freedom of Information Act. The court rejected the government's "strict construction" approach explicitly:

> "The government contends that since statutes waiving the sovereign immunity of the federal government are to be strictly construed . . . and that since section 552(a)(4)(E) is silent on the issue of retroactivity, Congress must not have intended it to apply to legal services rendered prior to its enactment. The legislative history, however, reveals that Congress intended that the courts should look to the existing body of law on the award of attorney fees in determining whether award is appropriate."
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> 553 F.2d at 1366-67.

v. *United States*, 249 U.S. 487, 489 (1919); *United States* v. *Temple*, 105 U.S. 97, 99 (1881). In *Canadian Aviator, Limited* v. *United States*, 324 U.S. 215 (1945), this Court was presented with the question whether the phrase "damages caused by a public vessel" of the Public Vessels Act was limited to damages caused by collision. After reviewing the statutory language and history, the Court concluded that:

> "While the general history of the Act as outlined above does not establish that the statute necessarily extends to the noncollision cases in view of the rule of strict construction of statutory waivers of sovereign immunity . . ., we think congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by unduly restrictive interpretation."

324 U.S. at 222 (citations omitted).

In the present case, even under a strict construction of the term "appropriate," section 307(f) authorizes the courts to make fee awards based upon the public interest as expressed in the goals of the Act, "without regard to the outcome of the litigation."[41] The "strict construction"

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[41] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 65 (1970). Just as the provisions for attorney fees in TSCA (15 U.S.C. § 2618(d)) and CPSA (15 U.S.C. § 2060(c)), *see* text *supra* at 24-26, "should be liberally construed to effectuate the purpose" of the statute (122 Cong. Rec. 32854 (1976) (re: TSCA); H.R. Rep. No. 94-1022, 94th Cong., 2d Sess. 23 (1976) (re: CPSA)), so too should Clean Air Act section 307(f). In this regard, EPA's position in this case is not unlike that taken by the government in *Chewning* v. *Schlesinger*, 471 F. Supp. 767 (D.D.C. 1979), in which it argued that principles of strict construction barred a Civil Rights Act Title VII employment discrimination action. There the court said:

> "The defendant insists, however, that, because the terms of the 1972 Act are silent on the issue of the government's liability in damages for pre-Act discrimination, full retroactive application of Section 717 would violate the rule of strict construction followed in waivers of sovereign immunity. ***This attempt to constrict the scope of the waiver intended by Congress is directly at odds with the principle that remedial statutes, in-***

principle does not support EPA's argument here any more than it did in *Indian Towing*, *Eastern Transportation Company*, or *Canadian Aviator*. As the Court of Appeals for the Fifth Circuit said in *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 142 (1971):

> "It is often said that the doctrine of sovereign immunity is a derivative of the common law maxim 'the king can do no wrong'. But conceptually it is far older. Zeus himself carried an aegis or breastplate, a buckler, and a thunderbolt which made him, the mythological sovereign, immune from all that could beset him. And common law provided its sovereign with the immunity of Zeus. Yet Zeus saw fit to strip himself of this protection by giving it to Athena, whereas modern sovereigns have shown much reluctance to do likewise. Probably more accurately, the reluctance comes from the advocative arm of the Government contending for a restrictive reading of legislative amelioration."

Here Congress' waiver of immunity should be given its intended effect.

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION.

The decision whether to award attorney fees in this case is committed to the discretion of the court of appeals, where the matter originated. The lower court's action may be reversed only where there has been a *clear* abuse of discretion. *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 560, *reh'g denied*, 415 U.S. 952 (1974); *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 524 (1947); *Allen Calculators, Inc.* v. *National Cash Register*, 322 U.S. 137, 142 (1944). An abuse of discretion requires judicial action that is arbitrary, fanciful, or unreasonable. *Lindy*

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cluding those expressly involving the government, should be construed liberally."

471 F. Supp. at 774 (footnotes omitted, emphasis added).

Cf. Tcherepin v. *Knight*, 389 U.S. 332, 336 (1967); *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968).

Brothers Builders, Inc. of Philadelphia v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3rd Cir. 1976); *Delno* v. *Market St. Railway Co.*, 124 F.2d 965, 967 (9th Cir. 1942). Judicial abuse of discretion is said to occur only when no reasonable person "could take the view adopted by the court." *Harrington* v. *DeVito*, 656 F.2d 264, 269 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1621 (1982); *Delno* v. *Market*, 124 F.2d 965. 967. The reviewing court should not substitute its independent judgment for that of the trial judge when assessing alleged errors committed within the exercise of discretion. *Mendoza* v. *United States*, 623 F.2d 1338, 1347 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Copeland* v. *Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (*en banc*); *Charter Oak Fire Insurance Co.* v. *Mann*, 304 F.2d 166, 168 (8th Cir. 1962). Considerable deference must be paid to the lower court's allowance of attorney fees because the lower court is more familiar with the quality of counsel and has better knowledge to assess the course of litigation. *Copeland*, 641 F.2d at 901; *Pete* v. *UMW Welfare and Retirement Fund of 1950*, 517 F.2d 1275, 1289 (D.C. Cir. 1975).

The legislative history of section 307(f) clearly indicates that in exercising the discretion conferred, the guiding consideration is whether the litigation "served" the "public interest" as expressed in the goals of the statute. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977). In this case, the court of appeals concluded that this litigation substantially contributed to the achievement of two goals of the Clean Air Act: "prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits." (Pet. at 18a; 672 F.2d at 41.) These objectives are unmistakably purposes of the Act, reflected in the statute and its legislative history.

The goal of citizen participation is reflected directly in section 307(d) of the Act, which provides not only an opportunity for written comment on proposed rules, but also an opportunity for any interested person to make an

oral presentation of views and a requirement that the record of such hearings be kept open for 30 days to receive rebuttal and supplementary information. 42 U.S.C. § 7607(d)(3), (d)(5)(ii), (d)(5)(iv). One major concern which led to the 1977 revisions of section 307(d) was the need for "adequate opportunity to challenge the factual basis underlying the proposed rule."[42] In its ruling on the merits of the case, the court referred specifically to the legislative history relating to these procedural provisions, which states:

> "For in the committee's view, appropriately broad administrative discretion to promulgate regulations must be restrained by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process."[43]

The goal of prompt judicial resolution of substantial questions is also reflected in the Act itself. Section 307(b)(1), which provides for court of appeals review of certain actions of the Administrator, limits review of nationally applicable regulations to the District of Columbia Circuit. 42 U.S.C. § 7607(b)(1). The congressional desire for prompt and final resolution of the validity of such regulations is reflected by the 60-day statute of limitations and the statutory provision that issues which could have been raised by a petition for review may not be raised in a subsequent enforcement proceeding. 42 U.S.C. § 7607(b)(1), (2). Moreover, the House Report which accompanied the 1977 amendments also reflects this concern for prompt judicial resolution of serious issues concerning the validity of EPA actions.[44] Thus, Congress clearly contemplated a mechanism to resolve serious issues concerning the validity of discretionary agency actions expeditiously and with finality.

EPA suggests that the Act has a single legislative purpose, "to protect and enhance the quality of the

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[42] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 318 (1977).

[43] *Id.* at 319. The court referred to this passage. 657 F.2d at 398.

[44] *Id.* at 322.

nation's air resources," 42 U.S.C. § 7401(b)(1), Pet. Brief at 30, and argues that the court of appeals did not find that EDF furthered that objective. *Id.* at 30-31. Here, again, EPA misses the mark. There is little question that EDF sought to further the ultimate statutory goal, since it contended that the regulations were too lax. 657 F.2d at 311. Moreover, by advancing the objectives identified by the court, EDF furthered the ultimate statutory purpose as well. For example, the Act itself explicitly requires EPA, in the rulemaking process for NSPS, to balance varying viewpoints with regard to air quality, dangers to the public health, and costs of achieving emission reduction. Clean Air Act sections 111(f)(2), (h), 42 U.S.C. § 7411(f)(2), (h). By challenging EPA's *ex parte* communications with representatives of industry, Congress and other executive branch officials, EDF sought to enhance opportunities for public participation in decisions which directly affect air quality and the public health. As found by the court of appeals, EDF's challenge sought to protect the procedural integrity of this process. In advancing that objective, especially by representatives of environmental interests who otherwise lack a financial incentive to participate, the general goal of enhancement and protection of air quality is also served.

The court of appeals found that EDF's conduct of this litigation contributed to the goals of the Act in four primary ways: (1) EDF helped to clarify the law with respect to important, novel and complex questions, Pet. at 13a, 672 F.2d at 39; (2) as a result of EDF's efforts, evidence documenting the alleged *ex parte* contacts with the agency were made available to the court and the public for the first time, Pet. at 18a, 672 F.2d at 41; (3) EDF's efforts assisted and educated the court and provided balanced representation of competing interests in resolving the highly technical and complex issues in the case, *id.*; and (4) judicial resolution of the issues raised by EDF provided guidance to EPA and a basis for evaluation of informal rulemaking procedures for the

entire executive branch. *Id.* In basing its decision on these factors, the court of appeals weighed traditional considerations supporting attorney fee awards in the past, even, in some cases, to unsuccessful parties. The court of appeals' decision should be upheld unless EPA shows that the court's reliance on these factors was a clear abuse of discretion. Significantly, EPA's brief does not even address that question.

A. Clarification of the Law Regarding Important, Novel and Complex Questions.

In its decision to award fees, the court of appeals found that "EDF's procedural challenges . . . clarified how the new section 307(d) would operate . . ." and applauded the "critical role played by EDF in the court's premier interpretation of the new rulemaking procedures laid down in the 1977 Amendments," a review that was "necessary in order to resolve close questions of interpretation" under the Act. Pet. at 18a, 17a, 18a; 672 F.2d at 41.

There is no dispute concerning the significance of the ultimate issues involved in this case; the importance of the case to the national welfare was acknowledged by all the parties. Pet. at 14a; 672 F.2d at 39. Moreover, resolution of the specific issues raised by EDF has been widely recognized as clarifying the law concerning proper informal rulemaking procedures. EDF challenged the regulations in part on the basis that the agency had improperly received written comments and permitted *ex parte* communications after the close of the comment period. Of central importance were two meetings involving high level EPA officials, one with the Senate Committee staff and another with the President, neither of which had been recorded in the rulemaking docket. Although the Clean Air Act is silent concerning oral communications after the close of the comment period, the court of appeals' ruling established important restrictions on such communications. While upholding the regulations, the court nonetheless indicated that oral communications

of "central relevance to the rulemaking" must be entered in the rulemaking docket. 657 F.2d at 402. In addition, the court of appeals rejected EPA's position when it concluded that written inter-agency communications during the comment period are not exempt from the docketing requirement, 657 F.2d at 405 n.519, thus indicating that they are included by the Act in the record for judicial review. In both these respects, the court of appeals' decision established important limits on a broad claim of executive branch confidentiality asserted by EPA.

The court of appeals' resolution of these issues has been widely recognized as an important development in the law of *ex parte* communications in informal rulemaking and with respect to the more fundamental question of presidential intervention in executive branch rulemaking proceedings. The latter question is especially significant in light of increased involvement of the White House and OMB in informal rulemakings on the basis of Executive Order No. 12291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 136-38 (1981). However, even without presidential involvement, the issue of *ex parte* communications had been the subject of apparently conflicting judicial opinions which this case helped to resolve with respect to the Clean Air Act.[45] For example, one commentator suggested that *Sierra Club* v. *Costle* "could prove to be a landmark development in administrative law," that although it was decided only six months previously, it had "already . . . assumed a position of some prominence in administrative law," and that it "appears likely to have significant impacts on both Clean Air Act standards-setting procedures and administrative principles." *D.C. Circuit Upholds NSPS*, 11 Envtl. L. Rep. 10218 (1981). A leading treatise on the subject of administrative law has recognized that the case is of

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[45] *See* cases cited in *D.C. Circuit Upholds NSPS for Coal-Fired Plants, Ratifies White House, Congressional Input into Rulemaking*, 11 Envtl. L. Rep. 10218, 10222 n.45 (hereafter "*D.C. Circuit Upholds NSPS*"). *See also* K. Davis, *Administrative Law* § 6.18 (Supp. 1982).

"major importance to the law of *ex parte* communications" and devotes several pages to discussing the implications of the case for the legality of presidential intervention in rulemaking. K. Davis, Administrative Law §§ 6:18 at 117-18, 6:40 at 156-59 (Supp. 1982). *See also* Schwartz, *Administrative Law Cases During 1981*, 34 Ad. L. Rev. 83, 88-9 (1982).

This case also received prominent attention in a recent symposium on presidential intervention and informal rulemaking. Participants in the symposium recognized it as an important first judicial holding in the area. Verkuil, *Symposium on Presidential Control of Rulemaking: An Introduction*, 56 Tul. L. Rev. 811, 814 (1982); Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 Tul. L. Rev. 830, 841 (1982); Davis, *Presidential Control of Rulemaking*, 56 Tul. L. Rev. 849, 859 (1982). One participant in the symposium observed:

> "*Sierra Club* should resolve much of the controversy about the substance and procedure of White House intervention in the informal rulemaking process."
>
> Cutler, *supra*, 56 Tul. L. Rev. at 832.

EDF's challenge involved questions of interpretation which were not specifically addressed by the Clean Air Act amendments of 1977 or by EPA regulations.[46] Only one provision of section 307 addresses the question of post-comment period procedures, requiring that documents which EPA determines to be of "central relevance to the rulemaking" be placed in the docket. 42 U.S.C. § 7607(d)(4)(B)(i). The court of appeals noted that "nothing in the statute prohibits EPA from admitting all post-comment communications into the record; nothing expressly requires it either." 657 F.2d at 396-97 (footnotes omitted). Moreover, since that provision is limited to "documents," the court noted that "[o]ral face-to-

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[46] Despite its clear authority to do so, 42 U.S.C. § 7601(a)(1), EPA did not adopt regulations addressing the procedural issues raised by the newly-enacted § 307(d), and has not done so to date.

face discussions are not prohibited anywhere, anytime, in the Act." *Id.* at 400. Accordingly, the court was required "to glean the law for this case by inference from the procedural framework provided in the statute." *Id.* at 397. As observed by another participant in the symposium discussed above, the issue raised in this case was "a question which has been basically left unanswered by Congress." Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 Tul. L. Rev. 879, 880 (1982). Thus, despite Congress' attempt to legislate a comprehensive scheme for informal rulemakings under section 307, the 1977 amendments left a gap which required judicial interpretation in order to resolve several questions with finality.

Several cases have awarded attorney fees on the basis of the benefits conferred by clarification of important questions of law. The potential for such benefits in judicial review proceedings under the Clean Air Act was clearly recognized by the First Circuit in *NRDC* v. *EPA*, 484 F.2d 1331 (1973), which was cited with specific approval in the 1977 legislative history.[47] As the First Circuit observed in that case:

> "Petitioners have thus helped to enforce, refine and clarify the law. They can be said to have assisted the EPA in achieving its statutory goals."
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> 484 F.2d at 1334.

In *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982), discussed above, the court awarded fees to a non-prevailing party, in part, "because the suit presented issues important to the construction of the Clean Air Act . . . ." 670 F.2d at 849. Similarly, in *Save Our Sound Fisheries Ass'n* v. *Callaway*, 429 F. Supp. 1136 (D.R.I. 1977), the court emphasized the public benefits accruing from the lawsuit, noting "the importance of the rulings gained by the plaintiffs in this case . . ." which clarified the duties of the Corps of

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[47] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), discussed at pp. 17-18 above.

Engineers under the statutes there in issue. 429 F. Supp. at 1146 n.16. *See also Halperin* v. *Department of State*, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977).

The need to remove ambiguity and clarify the applicable rules or laws has also been recognized as a legitimate basis for awarding attorney fees in other contexts, even to unsuccessful litigants. As the citations in the margin indicate, it is well established in many jurisdictions that an award may be properly made to a party who unsuccessfully claims an interest in a trust or estate, where there is an ambiguity either in the terms of the governing document or in the law itself.[48] Although there

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[48] *E.g., Union Central Life Insurance Co., Inc.* v. *Hamilton Steel Products, Inc.*, 493 F.2d 76 (7th Cir. 1974); *Troy Bank & Trust Co.* v. *Brantley*, 263 Ala. 428, 82 So. 2d 618 (1955); *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151, 183 N.E. 2d 505 (1962); *In re Estate of Sowder*, 185 Kan. 74, 340 P.2d 907 (1959); *Moore* v. *Alden*, 80 Me. 301, 14 A. 199, 201 (1888); *Deane* v. *Home for Aged Colored Women*, 111 Mass. 132 (1872); *In the Matter of Campbell's Trust*, 258 N.W. 2d 856 (Minn. 1977) (doctrine of allowance upheld but specific fees denied for lack of ambiguity); *Hereford* v. *Unknown Heirs of Tholozan*, 306 S.W. 2d 648, 650 (Mo. Ct. App. 1957) (limited to cases where litigant is not seeking a pecuniary benefit from the trust or estate); *In re Bittson's Trust*, 244 N.Y.S. 2d 926, 41 Misc. 2d 5 (App. Div. 1963); *Evans* v. *Adams*, 180 S.C. 214, 185 S.E. 57, 61 (1936) (finding the litigation especially beneficial because it resolved novel questions of law for which there was no recent precedent); *Moore* v. *Neely*, 212 Tenn. 496, 370 S.W.2d 537 (1963); *Monroe* v. *Winn*, 19 Wash. 2d 462, 142 P.2d 1022, 1024 (1943); Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597, 1629-30 (1974); Annot., 9 A.L.R. 2d 1132. A sufficient ambiguity exists where there is an honest difference of opinion as to the proper construction of the disputed terms. *Tolman* v. *Reeve*, 393 Ill. 272, 65 N.E.2d 815 (1946); *Estate of Smith*, 68 Ill. App. 3d 30, 24 Ill. Dec. 451, 385 N.E.2d 363 (App. Ct. 1979); *Attorney General* v. *Moore's Executors*, 19 N.J. Eq. 503 (E. & A. 1868). In explaining allowances for attorney fees where there was a need for judicial resolution of an ambiguity, some courts have explicitly recognized the benefit to all parties concerned, resulting from the adjudication of the particular question. *E.g., Troy Bank & Trust Co.*, 82 So.2d 618; *Schenectady Trust Co.* v. *Emmons*, 263 A.D. 542, 33 N.Y.S.2d 688 (App. Div. 1942). *See also* Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. J. 651 (1982).

are obvious factual differences between the present case and such cases, the basis for fee shifting is the same for both; where the litigation is brought in good faith to resolve an area of ambiguity, all the parties who are subject to the ambiguous rule or law benefit from the litigation which resolves the uncertainty.

In the present case, it certainly was not an abuse of discretion for the court of appeals to conclude that this litigation served the public interest in several pertinent respects. It clarified the law with respect to important issues: the propriety of *ex parte* contacts in informal agency rulemakings and the proper role for presidential involvement in such rulemakings. In addition, in rejecting the agency's broad claim of privilege and its interpretation of the Act in several respects, the court clarified EPA's responsibilities under the Act. Accordingly, by bringing this action EDF enabled the court to perform its proper role under section 307, to "enforce, refine and clarify the law." *NRDC* v. *EPA*, 484 F.2d at 1334. *See also Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 419 (1977).

B. Required Disclosure of Important Ex Parte Communications.

In determining that an award of attorney fees was appropriate, the court of appeals found:

> "Several documents pertaining to these contacts proferred by EPA for the first time on appeal, were consulted by the court. . . . We have little doubt that without EDF's substantial contribution to this aspect of the case, our deliberations would have been less enriched and more time consuming."
>
> Pet. at 18a; 672 F.2d at 41.

In this litigation EDF challenged the propriety of nine meetings between EPA officials and persons outside the agency after the close of the comment period. Two of those meetings were never recorded in the rulemaking docket: a meeting with the President on April 30, 1979, and a meeting with Senate staff on May 1, 1979. EDF

learned of these meetings only by obtaining the calendar of an EPA official pursuant to the Freedom of Information Act. J. App. at 13. When EDF filed a motion for discovery pointing out the lack of documentation, J. App. at 14, EPA opposed the motion. Nonetheless the court of appeals ordered EPA to submit affidavits providing factual details concerning the meetings specified in EDF's motion. J. App. at 25. Thereafter, EPA filed affidavits providing some of the information specified in the court's order. EDF, in its brief on the merits, pointed out the lack of documentation concerning the meeting with the President and other meetings. It requested the court to require the submission of further documentation, whereupon EPA "voluntarily" provided that information by affidavit before the court could rule on EDF's request. J. App. at 26-29; *Sierra Club I*, 657 F.2d at 390-91. Thus, as a direct result of EDF's efforts, important information became available to the public and to the court of appeals which EPA had vigorously opposed disclosing. As one commentator observed, "it is vital to note that before upholding EPA's *ex parte* contacts, the court required that they be fully detailed in the record." Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 Tul. L. Rev. 879, 893 n.31 (1982).

Several courts have recognized the legitimacy of attorney fee awards to parties who did not ultimately prevail on the merits of the litigation, based upon the value of exposure to the public and the court of information revealed during the course of the litigation. *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981); *Kopet* v. *Esquire Realty Company*, 523 F.2d 1005, 1008-9 (2d Cir. 1975) (merits of claim not yet determined, but deemed immaterial); *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *modified*, 535 F.2d 1318 (D.C. Cir. 1976) (reversed as to award of attorneys' fees for lack of jurisdiction); *Sierra Club* v. *Lynn*, 364 F. Supp. 834, 848 (W.D. Tex. 1973), *rev'd*

in part on other grounds, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

By obtaining important disclosures of information over EPA claims of privilege, EDF clearly served the public interest. Certainly the court's conclusion to that effect was not an abuse of discretion. Although the Clean Air Act limits judicial review to the record compiled by the agency, 42 U.S.C. § 7607, EPA was nonetheless required, over its strenuous objection, to disclose information which had potential to affect the record. The fact that EPA was required to submit affidavits which the court considered in ruling on the merits established an important precedent under the Act concerning the need for a full, fair, and accurate record for the court's review. This is true notwithstanding the ultimate outcome on the merits of EDF's challenge to the regulations.

In addition, the subject matter of the information produced was also important since it concerned the manner in which section 307's procedural requirements had been implemented by EPA. The court required EPA to submit sworn statements of high officials concerning meetings with congressional leaders and the President himself, rejecting a broad claim of executive branch confidentiality. Those disclosures enabled the court to make an informed judgment concerning the propriety of the meetings in question.

C. Assistance to the Court and Balanced Representation of Competing Interests.

In its decision to award fees, the court of appeals found:

> "We have little doubt that without EDF's substantial contribution . . ., our deliberations would have been less enriched and more time consuming . . . .
>
> ". . . It was absolutely essential in a case of this dimension that this Court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking not only involved highly technical and complex data, but controversial consid-

erations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed.

"The questions raised by Sierra Club and EDF needed to be resolved; yet no other party had a sufficient economic interest at stake to represent them. Sierra Club and EDF were required to expend great efforts to perform their advocacy tasks well in matters of such technical complexity; their contribution to the Court's prompt disposition of all issues raised in the case was substantial."

Pet. at 18a-19a, *Sierra Club II*, 672 F.2d at 41.

The court of appeals' reliance on the need for balanced representation is especially appropriate in this case because section 307(f) was enacted, in part, in response to the decision in *Natural Resources Defense Council, Inc.* v. *EPA*, 512 F.2d 1351 (D.C. Cir. 1975), which emphasized the need for balanced representation in judicial review litigation under the Act. The court held that section 307, as enacted in 1970, did not provide authority to award attorney fees, but urged enactment of a fee award provision, recognizing the need for a balance in representation of industry and environmental interests:

"If Congress fails to act, there may come a day soon when EPA's determinations, though frequently attacked because they are too stringent, are only seldom contested because they are not stringent enough."

512 F.2d at 1357-58.

In several other cases, cited in the margin, courts have awarded attorney fees to non-prevailing parties based on the need for effective representation of competing parties and interests.[49] This factor bears directly on the re-

[49] *Troy Bank & Trust Co.* v. *Brantley*, 263 Ala. 428, 82 So.2d 618 (1955); *Estate of Smith*, 68 Ill. App. 3d 30, 24 Ill. Dec. 451, 385 N.E.2d 363 (App. Ct. 1979); *Central Trust Co.* v. *Harris*, 152 Kan. 296, 103 P.2d 902, 905 (1940); *In re Atwood's Trust*, 227 Minn. 495, 35 N.W.2d 736, 740 (1949); *In re Bittson's Trust*, 244 N.Y.S.2d 926, 41 Misc.2d 5 (App. Div. 1963); *Schenectady Trust Co.* v.

sult in this case. The interests which EDF and Sierra Club represent would have been unrepresented without their participation in this case. Moreover, section 111 of the Act, under which the NSPS in issue in this case was promulgated, explicitly requires that environmental, economic and energy supply considerations be balanced in establishing the emission limitations. 42 U.S.C. § 7411 (a)(1). Thus, the court of appeals' concern for balanced representation reflected a policy concern which is reflected not only in the legislative history, but in the operative provision of the Act itself. Moreover, the court of appeals recognized the assistance it received as a result of EDF's participation when it explicitly acknowledged the value of EDF's factual research and legal analysis. Pet. at 17a; 672 F.2d at 41. For example, without EDF's efforts, the court and the public would have been unaware of the substance of many of EPA's *ex parte* contacts, or that some had even occurred. Based on its first-hand familiarity with this case, the court also concluded that the caliber of EDF's written and oral presentations was "exemplary." Pet. at 13a; *Sierra Club II*, 672 F.2d at 39. In finding that EDF's participation furthered the public interest, the court clearly did not abuse the discretion conferred upon it by Congress.

D. Guidance to EPA and the Executive Branch With Respect to Informal Rulemaking Procedures.

The court of appeals found that the prompt resolution of the issues raised by EDF and the Sierra Club "will contribute both to the Agency's future efforts to implement the Clean Air Act and to Congress's ongoing review of the Act." Pet. at 16a; 672 F.2d at 40. The Court also observed:

> "We note too that EDF's procedural challenges not only clarified how the new section 307(d) would

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Emmons, 33 N.Y.S.2d 688, 263 App. Div. 542 (App. Div. 1942); *Luttgen* v. *Tiffany*, 27 R.I. 416, 93 A. 182 (1915); *Evans* v. *Adams*, 180 S.C. 214, 185 S.E. 57, 61 (1936). *See generally*, Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 675 & n.234 (1974).

> operate, but apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings. *See* Stockman Memorandum for Heads of Executive Departments and Agencies 2 (June 13, 1981)."
>
> Pet. at 18a; 672 F.2d at 41.

As previously discussed, the court of appeals' decision in this case addressed several novel questions concerning informal rulemaking procedures which were not addressed by EPA regulations or by section 307 itself. As one commentator observed:

> "[T]he court elaborated at great length on the often puzzling requirements of section 307 of the Clean Air Act, with the result that those involved in Clean Air Act rulemakings have some guidance on what is expected of them and Congress has some indication of gaps in the existing provision that required the Court virtually to speculate about Congressional intent."
>
> *D.C. Circuit Upholds NSPS*, 11 Envtl. L. Rep. 10218, 10222 (1981).

A prominent indication of the importance to the executive branch of the decision on the merits in this case is the "Stockman Memorandum," to which the court referred specifically. J. App. 30-31. The Memorandum was plainly influenced by the decision in this case. Although Executive Order 12291 does not address the issue raised in this case, the Memorandum attempts to ensure that agency rulemaking records will reflect information received from OMB under the Executive Order.[50] Moreover, the Memorandum points out that the procedures

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[50] One participant in the Symposium discussed at pp. 40-41 *supra*, is Counsel to the Vice President and the Task Force on Regulatory Relief, who described the Stockman Memorandum as the "guidelines" which "implemented" the Executive Order, Gray, *Presidential Involvement in Informal Rulemaking*, 56 Tul. L. Rev. 863, 874-75 (1982), although he notes that the views expressed are not necessarily those of the Task Force or the Vice President. *Id.* at 863 n.*.

adopted will be consistent with "the holding of and policies discussed in *Sierra Club* v. *Costle*. . . ." J. App. at 31. There is no citation of any other legal authority in the Memorandum. As a result, it seems clear that the decision in this case gave important guidance to the executive branch concerning proper informal rulemaking procedures. Certainly the court of appeals' finding that the litigation furthered the public interest in this respect was not arbitrary, fanciful or unreasonable. EPA has made no showing of an abuse of discretion.

III. IF THIS COURT FINDS THAT THE COURT OF APPEALS APPLIED AN INCORRECT LEGAL STANDARD, THE MATTER SHOULD BE REMANDED.

It is well established that an award of attorney fees is committed, within limits prescribed by Congress, to the discretion of the court in which the matter originated.[51] *Alyeska*, 421 U.S. 240 (1975). Such an exercise of discretion requires the court to base its decision on its familiarity with the conduct of the matter before it and with the record as a whole. If this Court rules that the court applied an incorrect standard, Sierra Club and EDF should have an opportunity to demonstrate their eligibility for a fee award under the proper one. If the standard adopted by this Court is to be interpreted in a manner similar to other fee award statutes, the decision to award fees will require consideration of more than the final judgment of the court. Among such factors could be a detailed assessment of the issues raised in this case, the degree to which each party was "successful" on each of those legal issues, and other respects in which the litigants have "successfully" served the public interest. In this case, the court of appeals performed a detailed review of the record, which the government has

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[51] The Solicitor General himself has acknowledged that § 307(f) "confers discretion on the courts of appeals to decide when attorneys' fee awards are 'appropriate.'" Reply Brief for Petitioner (filed in support of Petition for Certiorari), at 1.

conceded to be "an extended analysis."[52] If this Court now establishes a new interpretation of the statutory standard, the court of appeals should have the opportunity to apply that standard to the facts of this case.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[52] Brief for the Respondent in Opposition at 5, *Save the Valley, Inc.* v. *EPA*, *petition for cert. filed*, —— U.S.L.W. —— (U.S. Oct. 12, 1982) (No. 82-637).

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No. 82-242

In the Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-242

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
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v.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Although they claim to have achieved various "public benefits" in the underlying merits litigation (see pages 12-20, *infra*), respondents do not dispute the fact that they were totally unsuccessful in their challenge to EPA's rulemaking. Nevertheless, respondents contend that the plain language of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), makes success, or even some tangible accomplishment, totally irrelevant to a court's decision to award attorneys' fees under that statute. But the literal language of the statute offers no answer to the question presented by this case. Instead, the Court must interpret the statute in light of its legislative history and with reference to the usual practices of Congress in this area, bearing in mind the principles of statutory construction that counsel against interpreting statutes in a manner that imposes monetary liability on the United States in the absence of clear and unambiguous congressional intent. When all of these factors are taken into account, it is clear that the award of attorneys' fees in this case cannot stand.

1. Respondents argue (EDF Br. 10-11; S.C. Br. 13-18[1]) that the plain language of Section 307(f) precludes a court from requiring any element of success or accomplishment as a prerequisite to an attorneys' fee award because such a prerequisite is not expressly mentioned. Relying on dictionary definitions, EDF argues that the term "appropriate" should be read to permit the courts to award attorneys' fees as they deem "suitable, proper or fitting" (EDF Br. 11). This argument proves too much, however, for even EDF acknowledges that there are limits to the courts' discretion to award attorneys' fees under Section 307(f) and that such awards are therefore reviewable under an abuse of discretion standard (*ibid.*).[2]

a. As we stated in our opening brief (at 13-14), the backdrop of the traditional American rule against fee-shifting counsels against an interpretation of Section 307(f) that would authorize attorneys' fee awards for totally unsuccessful litigants. In his dissenting opinion in *Alabama Power*

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[1]The Brief for Respondent Environmental Defense Fund will be cited as "EDF Br." and that filed by the Sierra Club will be cited as "S.C. Br."

[2]Section 307(f) authorizes a court to award attorneys' fees "whenever *it determines* that such award is appropriate" (emphasis added). Read literally, the statute would leave fee awards to the unreviewable and unlimited discretion of the court. For example, fees could be awarded to unsuccessful defendants or respondents, as well as to unsuccessful plaintiffs or petitioners, depending upon the court's personal beliefs as to the significance of the interests represented by the opposing parties. As Judge Wilkey noted in his dissenting opinion in *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 19-24 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006, such a reading of "appropriate" raises serious constitutional problems because, as interpreted by respondents and the court of appeals, Congress has failed to provide the courts with any ascertainable standards for determining the "appropriateness" of a fee award in a particular case. Thus, even though Congress has provided statutory authorization for fee awards, that authorization would still embroil the courts in the same policymaking exercise of "pick[ing] and choos[ing] among plaintiffs * * * depending on the court's assessment of the importance of the public policies involved in particular cases"

Co. v. *Gorsuch*, 672 F.2d 1, 17 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006 (footnotes omitted), Judge Wilkey made the same point:

> The trouble with the [court of appeals' decision in this case] is that it would dramatically alter the award structure. In the absence of some evidence that Congress intended a dramatic departure, we should not adopt such a construction. Were such an expensive and unprecedented result contemplated, it surely would have been mentioned. Yet in none of the myriad House and Senate reports, committee prints, and floor debates cited in this opinion were more than a few lines ever devoted to these [attorneys' fee] sections at all, let alone any mention made of such a change. * * * If Congress meant for "appropriate" to mean that all non-frivolous plaintiffs would recover, it surely would have said so. * * *

Notwithstanding the court of appeals' dramatic departure from all previously-accepted notions of fee-shifting, EDF argues (at 27-34) that the rule requiring strict construction in the government's favor of statutes waiving sovereign immunity is inapplicable here. It does so by neatly categorizing some of this Court's sovereign immunity cases into groups that do not encompass the present case and then asserting that there are no other situations in which the rule of strict construction operates (*id.* at 28).

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that the Court found objectionable in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 (1975). In our view, however, it is not necessary to reach the constitutional problems posed by Judge Wilkey so long as "appropriate" is interpreted, as we urge, to encompass an element of tangible accomplishment, even if a favorable judgment on the merits is not required. This is a standard readily evaluated by the courts and thus capable of consistent application. In keeping with this Court's policy of avoiding unnecessary constitutional decisions, see, *e.g.*, *National Cable Television Association* v. *United States*, 415 U.S. 336, 342 (1974), our definition of "appropriate" should prevail over respondents' and the court of appeals' standardless and amorphous formulation.

Contrary to EDF's argument, the government has not invented any new doctrine of sovereign immunity in this case. The question is straightforward: what is the scope of the waiver Congress intended when it enacted Section 307(f)? Clearly, Congress intended that the government would be liable for fees in some circumstances. But, as noted by Judge Wilkey, it did not address the question presented by this case, viz., whether the government should subsidize totally unsuccessful litigants. In principle, the question here is no different from that presented in *United States* v. *Testan*, 424 U.S. 392, 405-407 (1976), in which the Court noted that in the Back Pay Act Congress had expressly authorized a monetary cause of action for federal employees "subjected to a reduction in their duly appointed emoluments or position" (*id.* at 407), but that the Act did not create a damages remedy for one who had not yet been appointed to the position he sought. Here, too, it is clear that Congress has provided a monetary remedy in the form of attorneys' fees for certain classes of plaintiffs, *i.e.*, those who prevail or accomplish something concrete short of judgment, but there is no evidence whatsoever to support the notion that Congress has provided a "remedy" for totally unsuccessful litigants. In deciding this case, therefore, the Court must be guided by the familiar principles of sovereign immunity just as it was in *Testan*. See, *e.g.*, *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922) ("A liability in any case is not to be imposed upon a government without clear words * * * and where, as here, the liability would mount to great sums, only the plainest language could warrant a court in taking it to be imposed"); *United States* v. *Zazove*, 334 U.S. 602, 616-617 & n.24 (1948) (same).[3]

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[3]EDF also argues (at 29-30) that the rules governing construction of waivers of sovereign immunity do not apply to substantive questions, such as the meaning of "appropriate" in this case, but are instead limited to "procedural" questions. This Court has never drawn such a distinction. Even if it had, however, it is fairly arguable that attorneys' fees are

b. A fair reading of the legislative history underlying development of the term "appropriate" does not support an interpretation of Section 307(f) that authorizes fee awards to losing litigants. Instead, "appropriate," which Congress first adopted in 1970 as a standard in Section 304(d) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d) (see Pet. Br. 15-17), was chosen as a term of art to encompass two very different classes of parties that Congress intended to make eligible for attorneys' fees. The first group included successful defendants subjected to "frivolous or harassing" litigation. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970). The second group included plaintiffs bringing "legitimate actions," a category that Congress meant to *extend* to those whose suits "result in successful [pollution] abatement but do not reach a verdict" (*ibid.*). This scheme encouraged proper use of the Clean Air Act's citizen suit provision (Section 304, 42 U.S.C. (Supp. IV) 7604) by subsidizing meritorious suits and penalizing clearly unreasonable ones.

Notwithstanding Congress' clear explanation of the twin circumstances in which an attorneys' fee award would be "appropriate," respondents contend that a single sentence from the section-by-section analysis contained in the Senate Report evidences Congress' true intent in 1970. That sentence provided that attorneys' fee awards would be authorized "without regard to the outcome of the litigation" (S. Rep. No. 91-1196, *supra*, at 65). If read literally, as respondents urge, this statement is clearly at war with the carefully limited circumstances that the Senate Report itself described as proper for fee awards. The statement is reconcilable with the body of the Senate Report only if one remembers that, in 1970, the "outcome of the litigation" referred to the final judgment (see Pet. Br. 20-21 & n.13). If abatement of a violation was achieved prior to judgment, the suit would be dismissed as moot. See, *e.g.*, *Delaware*

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a "procedural" matter because they are collateral to the main action. See *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 451 (1982).

Citizens for Clean Air, Inc. v. *Stauffer Chemical Co.*, 367 F.Supp. 1040 (D. Del. 1973); cf. *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981). Even respondents acknowledge (EDF Br. 16) that it was not until 1980 that this Court held that a party could "prevail" by way of settlement rather than litigated judgment. *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). Thus, as we stated in our opening brief (at 21), the 1970 legislative history supports the view that Congress intended to discard a favorable final judgment as a prerequisite to an award of attorneys' fees; it does not, however, suggest that Congress intended to authorize fee awards to litigants who did not achieve *any* measure of tangible success.

Respondents assert (EDF Br. 19; S.C. Br. 22-24) that even if Congress so limited the meaning of "appropriate" in 1970, it intended to expand the meaning of the same word in 1977, when it enacted Section 307(f). Respondents completely gloss over Congress' clearly expressed intention to conform Section 307 to Section 304 (see Pet. Br. 15-17).[4] The Sierra Club asserts that in actions to review EPA regulations brought under Section 307 there would be no occasion for "abatement of pollution" prior to judgment because EPA is not a polluter (S.C. Br. 24-25). This surely is mere quibbling. Achievement of the desired result prior to judgment, equivalent to abatement of pollution, is certainly possible and, indeed, fairly common in Section 307 actions. EPA may withdraw regulations or modify its orders after a

[4]Respondents also ignore the fact that another 1977 amendment to the Clean Air Act reinforces Congress' intent to retain its original, 1970 formulation of the circumstances in which attorneys' fee awards would be appropriate. In addition to providing for fees in Section 307(f), Congress also amended Section 113(b), 42 U.S.C. (Supp. IV) 7413(b), to provide that defendants in federal enforcement actions are eligible for fee awards whenever the government's enforcement actions are "unreasonable." The original structure for attorneys' fee awards was thus preserved in the 1977 Amendments: Plaintiffs could be awarded fees if they achieved some tangible benefit, even if short of judgment, that served the purposes of the Clean Air Act, while defendants could obtain fees if they were subjected to "unreasonable" actions, whether initiated by private plaintiffs or by EPA.

Section 307 action is initiated (see, *e.g.*, *EPA* v. *Brown*, 431U.S. 99 (1977); *Carolina Power & Light Co.* v. *EPA*, No. 79-1741 (4th Cir. Nov. 30, 1980); *Community Action Research Group* v. *Camin*, No. 79-1940 (8th Cir. Mar. 12, 1983)), or it may settle the litigation (see, *e.g.*, *Chemical Manufacturers Association* v. *EPA*, No. 79-1112 (D.C. Cir.)). In these situations, the petitioner "succeeds" in its suit in the sense of achieving the desired result, even though the official disposition on the court dockets may be dismissal of the petition for review. Cf. *EPA* v. *Brown*, *supra*, 431 U.S. at 104.

Respondents also claim (S.C. Br. 21; see also EDF Br. 17-18) that the 1977 House Report's endorsement of *NRDC* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973), shows that Congress intended to expand eligibility for attorneys' fees to unsuccessful litigants whose challenges were "constructive and reasonable." We have dealt at length with the First Circuit's decision (Pet. Br. 26-28). We note here only that the First Circuit awarded attorneys' fees to NRDC because NRDC *succeeded* in substantial part (*i.e.*, it brought a "legitimate action"), and furthered the public interest in proper implementation of the Clean Air Act in so doing.[5] Thus, the First Circuit's decision represents a direct application of the standards for attorneys' fees articulated by Congress in 1970. See S. Rep. No. 91-1196, *supra*, at 38.

Finally, respondents claim that Congress evidenced an intent not to "limit" attorneys' fees to successful parties by rejecting a proposal that fees be awarded automatically to a

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[5]The court also reasoned that if NRDC's challenge had been "wholly or in substantial part frivolous," EPA, not NRDC, should be awarded attorneys' fees (484 F.2d at 1338). Under this standard, it is at least arguable that EPA, not Sierra Club, would be entitled to an award of attorneys' fees for the underlying litigation in this case. In *Sierra Club* v. *Costle*, 657 F.2d 298, 318-322 (D.C. Cir. 1981), the court quickly disposed of Sierra Club's arguments concerning the proper interpretation of Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411. During the course of its discussion, the court confessed that it was "frankly at a loss to understand" Sierra Club's arguments (657 F.2d at 320). The court found the text of the statute "relatively clear" and held that Sierra Club's contrary interpretation was not "warranted by a fair reading of the Act or the underlying legislative history" (*id.* at 321).

"prevailing party" (S.C. Br. 20; EDF Br. 19-20). The Senate proposal, contained in S. 252, 95th Cong., 1st Sess. (1977), however, would not have created a limitation on the pre-existing standards for attorneys' fees. To the contrary, it would have expanded substantially the government's liability for attorneys' fees. Gone, for example, would have been the requirement that the litigation be in the public interest, *i.e.*, assist in the proper implementation of the Clean Air Act. Instead, even if a party prevailed, but frustrated the goals of the Clean Air Act, an award of attorneys' fees would have been mandated. Polluter defendants who prevailed would have been granted fees no matter how technical their victory or how substantial the enforcement proceeding.

The Senate Staff Report discussing this proposal, upon which respondents rely, was directed at the automatic character of the attorneys' fee awards, not at the requirement of success or accomplishment in the litigation. The staff wrote (Staff of Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 37 (Comm. Print 1979)):

> Is there any need to modify the existing judicial practice of awarding fees based on the individual circumstances of each case?

The clear import of this passage is that each case must be studied to determine whether it furthered the goals of the Clean Air Act, not that totally unsuccessful litigants may be granted fees.[6]

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[6]EDF suggests (at 12, 23-24 n.35) that Congress' use of other standards for awards of attorneys' fees in other statutes and in different sections of the Clean Air Act itself means that the "appropriate" standard must be interpreted to authorize fees for totally unsuccessful parties. But the fee provisions cited by EDF are part of make-whole remedies for individuals personally injured by statutory violations. For example, employee protection provisions in numerous statutes authorize the Secretary of Labor to include an award of fees and expenses in a reinstatement order directed to an employer found guilty of discrimination against an employee for cooperating in the enforcement of various

The report's reference to "the existing judicial practice" does not alter this analysis. At the time the report was written, there were only three decided cases interpreting the "appropriate" standard, and it is clear that those cases cannot support fee awards to parties who do no more than air losing claims. One of the three cases, *NRDC* v. *EPA*, *supra*, 484 F.2d at 1331, has already been adequately discussed. The other two cases are *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D.Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975) (table), and *Citizens Association of Georgetown* v. *Washington*, 383 F.Supp. 136 (D.D.C. 1974), rev'd on other grounds, 535 F.2d 1318 (D.C. Cir. 1976).

In *Delaware Citizens*, an admitted violation of the Clean Air Act was abated after the filing of suit when the defendant obtained a variance from the otherwise applicable pollution control requirements. Nevertheless, because it found that plaintiff's suit had not altered the defendant's conduct nor "in any other tangible or direct way contributed to achievement of the objectives of the Clean Air Act," 62 F.R.D. at 355, the court *rejected* plaintiff's request for fees. Although the court observed in dicta that "ultimate success" in a citizen's suit under Section 304 might not be a

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statutes. See, *e.g.*, Clean Air Act, 42 U.S.C. (Supp. IV) 7622(b)(2)(B); Toxic Substances Control Act, 15 U.S.C. 2622(b)(2)(B); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1293(c); Clean Water Act, 33 U.S.C. 1367(c); Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(2)(B)(ii); Energy Reorganization Act of 1974, 42 U.S.C. (Supp. IV) 5851(b)(2)(B); Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6971(c). In two other statutes cited by EDF, Congress authorized private damages actions for persons injured in body or property by operators acting in violation of the statutes; attorneys' fees and expenses are included in the definition of damages that may be awarded in such actions. See Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1270(f); Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. IV) 1349(b)(2).

That Congress included attorneys' fees and expenses as part of make-whole remedies in provisions dealing with the adjustment of private rights sheds little light on its intent with respect to standards for the award of attorneys' fees in those situations in which the object is to promote the public interest in proper implementation of the Clean Air Act.

prerequisite to an attorneys' fee award (62 F.R.D. at 355), the court also stated that fee awards to a losing party should be reserved for those cases in which the litigation "serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor" (*ibid.*). This hardly constitutes an endorsement of fee awards to parties whose "contribution" to the goals of the statute was an unnecessary validation of the agency's actions. Indeed, elsewhere in the opinion the court questioned whether fees would be "appropriate" when, as here, state and federal pollution control agencies are already actively engaged in fulfilling their statutory duties (*id.* at 357).

The decision in *Citizens Association* is of no precedential value in light of the court of appeals' reversal (535 F.2d 1318 (D.C. Cir. 1976)). But even the district court's reasoning on the merits shows that plaintiffs in that case accomplished more than the airing of novel issues. The court made it clear that plaintiffs lost their case to enjoin construction of two buildings primarily because the District of Columbia government had failed to enact the regulatory framework contemplated by the Clean Air Act (383 F.Supp. at 145). The court thus saw the suit as a helpful and necessary effort to galvanize the District to action (*id.* at 145-146). On appeal, the court of appeals vacated the award of attorneys' fees upon finding that Section 304 of the Clean Air Act did not provide the district court with jurisdiction to remedy the District of Columbia's failure to implement the Act (535 F.2d at 1322-1323). Thus, the district court in *Citizens Association* had overstepped its authority to award fees because of its concern for conduct thought to be impeding proper implementation of the Clean Air Act. By contrast, the court of appeals in the present case found that EPA had already acted properly.

The "existing judicial practice" cited by the Senate Staff, therefore, consisted only of fee awards to partially prevailing parties whose losing contentions were not frivolous or harassing, *NRDC* v. *EPA*, *supra*, 484 F.2d at 1338-1339. Accordingly, there is no reason to read into the affirmation

of "the existing judicial practice" a congressional intent to authorize attorneys' fee awards to totally unsuccessful parties.

2. Respondents also argue that the result below is consistent with that reached by "[e]very federal court to consider the issue" (EDF Br. 22; see also S.C. Br. 27-28). Respondents are building upon a strawman because nearly every case has been decided by the District of Columbia Circuit. Even more to the point, however, the District of Columbia Circuit itself has not awarded fees to totally unsuccessful litigants in any case but the present. In *Alabama Power Co.* v. *Gorsuch, supra*, and *Environmental Defense Fund* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), petition for rehearing pending, No. 79-1580, both decided the same day as the instant case, the petitioners were largely successful. Thus, language in those opinions concerning fee awards to non-prevailing parties is merely dicta. In *Village of Kaktovik* v. *Watt*, 689 F.2d 222 (D.C. Cir. 1982), the court acknowledged, as it had to under controlling circuit precedent, that "success" was not required for a fee award, but it then declined to award any fees upon finding that plaintiffs' contribution to the goals of the statutes at issue in that litigation did not merit compensation; again, therefore, the court's observations about awards to losing parties were dicta. Finally, in *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981), it was at least arguable that plaintiffs accomplished something. At the time plaintiffs filed suit in that case, and for three years thereafter, the District of Columbia was in clear violation of its implementation plan under the Clean Air Act. Plaintiffs never obtained a favorable final judgment, however, because the District modified the plan, and EPA approved the revision, in such a way as to render the case moot. This anomalous situation, in which plaintiffs lost their case only because of an intervening change in the law, hardly qualifies as support for the decision below. Moreover, as the court noted in awarding fees (639 F.2d at 804), even an "unsuccessful" suit

in such circumstances may produce a tangible accomplishment by displaying to the public a record of inaction or action delayed on the part of responsible government agencies. Respondents here cannot claim even this limited contribution to the public interest.[7]

3.a. Despite their total lack of success on the merits of the underlying litigation, the court of appeals held that respondents were entitled to attorneys' fees because their litigation substantially contributed to the achievement of two goals of the Clean Air Act: "prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits" (Pet. App. 18a). The court of appeals offered no support for its assertion that these objectives are goals of the statute; EDF, however, attempts to bolster the court's opinion by arguing (at 35-36) that the language of the statute and its legislative history support the court's conclusion. In the context of this case, EDF's arguments are erroneous.

EDF cites (at 36) those portions of the Act providing strict time limits on judicial challenges to EPA regulations for the proposition that "prompt resolution of serious questions of statutory interpretation" is an express goal of the statute justifying attorneys' fee awards. But, as we pointed out in our opening brief (at 31-32 n.20), Congress provided "prompt" judicial review provisions not for the sake of encouraging fee-generating litigation but rather in recognition of the inescapable fact that judicial challenges to EPA regulations were inevitable and that, absent complete preclusion of review, the best Congress could do to maintain the Act's strict compliance deadlines was to limit judicial review in time and place. The legislative history of the Clean Air Act makes Congress' purpose clear (see H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 322 (1977); S. Rep. No. 91-

[7]One other court of appeals has awarded fees to losing plaintiffs, relying on *Metropolitan Washington, supra. Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982). The government has not yet decided whether to seek rehearing or review by this Court in that case.

1196, *supra*, at 40-41). Thus, far from evincing an intent to encourage judicial challenges, the statutory structure and legislative history show an intent to minimize the interference with achievement of the Act's substantive goals that would necessarily be occasioned by unrestrained judicial review; it is impossible to understand how EDF can transform this congressional purpose into a desire for the payment of attorneys' fees to unsuccessful litigants.

EDF also argues (at 35-36) that citizen participation is an express goal of the Act. But the statutory provisions it cites all relate to citizen participation in agency *rulemakings*; EDF does not cite any statutory provision (nor are we aware of any) that seeks to *encourage* citizen-initiated litigation once the rulemaking proceedings have been concluded. As we noted in our opening brief (at 35-36 & nn.23-24), citizen participation in agency rulemakings can inure to the benefit of the public by leading to better informed decisionmaking, whether or not the citizens' views are ultimately adopted. Comparable benefits are not reaped, however, by citizen participation in judicial review, and thus Congress has consistently differentiated between participation before the agency and in the courts (see *ibid.*; see also *Pacific Legal Foundation* v. *Goyan*, 664 F.2d 1221, 1225 (4th Cir. 1981)). Contrary to EDF's argument (at 36), therefore, one cannot fairly transmute Congress' solicitude for public participation in the rulemaking process into a congressional mandate for the federally-subsidized presentation of nonmeritorious legal positions in court.

b. The Sierra Club does not point to any specific "public benefits" conferred by its litigation efforts, relying instead on the court of appeals' assertion that "prompt resolution of the important and complex issues" (Pet. App. 8a) involved in this case is sufficient to justify an award of attorneys' fees (S.C. Br. 29).[8] We have already demonstrated that Congress

[8]Notably, the Sierra Club has abandoned the contention advanced in its Brief in Opposition (at 2) that it aided agency implementation of the Clean Air Act "by instructing EPA on a better (albeit not mandatory) way to conduct rule-makings * * *." The contention was dropped, no

did not intend to award fees for this purpose (see pages 12-13, *supra*), and thus we need not further discuss the Sierra Club's argument. EDF, on the other hand, contends (at 34-49) that its litigation advanced the goals of the Clean Air Act in four specific ways. As we demonstrate below, it is clear that none of these purported "public benefits" is sufficient, either alone or in combination, to justify the court of appeals' award of attorneys' fees in this case.

(1) EDF claims that its unsuccessful challenge to EPA's procedures in this rulemaking "clarified" the applicable law to be followed in future rulemakings (EDF Br. 38-43).[9] But such "clarification" is in any event the normal result of all litigation.[10] Clarification of the governing law serves a purpose when it results in the correction of an agency error or mistake, as was true in three of the cases cited by EDF (at 41-42) (*Halperin* v. *Department of State*, 565 F.2d 699 (D.C. Cir. 1977); *NRDC* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973); *Save Our Sound Fisheries Ass'n* v. *Callaway*, 429

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doubt, because there is not the slightest evidence that Congress intended to award attorneys' fees to anyone undertaking such admittedly superfluous instruction. Similarly, EDF no longer argues, as it did in its Brief in Opposition (at 15), that fees may be awarded to a totally unsuccessful litigant so long as the underlying lawsuit was "constructive and reasonable."

[9]EDF's claim (at 39) that it not only "clarified" the law but actually triumphed over EPA in connection with the handling of interagency communications is puzzling. EDF asserts (*ibid.*) that the court "indicat[ed] that [such communications] are included by the Act in the record for judicial review." To the contrary, the court stated that "[t]hese materials, although docketed, are *excluded* from the 'record for judicial review' " (657 F.2d at 404 n.519; emphasis added).

[10]EDF asserts (at 42-43 & n.48) that courts frequently award fees to litigants who, even though unsuccessful in their own behalf, "succeed" in clarifying ambiguous trust documents or the law governing such documents. EDF further contends (*ibid.*) that this rule justifies the fee award here. But the rule upon which EDF relies permits attorneys' fees and expenses to be paid from a trust fund or estate when the litigation is reasonably necessary to interpret the governing instrument and ensure proper administration of the fund. See, *e.g.*, *Union Central Life Ins. Co.* v. *Hamilton Steel Products, Inc.*, 493 F.2d 76, 79 (7th Cir. 1974); *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151, 183 N.E.2d 505 (1962). In the

F.Supp. 1136 (D.R.I. 1977)). But when, as here, the agency has not misstepped, such " clarification" does nothing more than promote the mere "refinement of jurisprudential understanding," *Valley Forge Christian College* v. *Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982), a point made all the more apparent by EDF's assertion that this litigation was valuable because it provided fodder for a symposium on informal rulemaking (EDF Br. 40-41).

(2) EDF relies heavily on the disclosure of "Important Ex Parte Communications" (EDF Br. 43) as conferring a public benefit sufficient to justify the award of attorneys' fees. A review of the proceedings concerning these "disclosures" is necessary to put this claim in perspective. After the close of the formal comment period on the rulemaking, EPA officials orally discussed the pending NSPS proposal in meetings with the President and other representatives of the Executive Branch, members of the Legislative Branch and outside interest groups, including EDF (see *Sierra Club* v. *Costle*, 657 F.2d 298, 387-389 (D.C. Cir. 1981)). Of nine identified meetings, seven were summarized and noted in the rulemaking docket (see, *e.g.*, J.A. 17). The remaining two—a briefing for Senate staff persons and a meeting with the President—were not entered in the rulemaking docket. EDF filed a motion for leave to depose certain EPA officials, or to serve interrogatories, to obtain "descriptions of

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present situation, of course, there is no trust fund or estate from which fees may be awarded. Instead, EDF was awarded fees against its opponent, the federal government. But, under EDF's theory, the government also should have been awarded fees for its participation as a necessary party in the litigation. Such a result, which obviously was not intended by EDF, only points out the correctness of this Court's observation that the "common fund" exception to the American rule against fee-shifting is not suited for use in the context of judicial review of agency action. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 264-265 n.39 (1975).

the conversations and meetings, particularly by non-EPA participants" (J.A. 14). A motions panel of the court of appeals referred the request for discovery to the merits panel (J.A. 24), which ultimately denied the requested discovery upon finding it neither "necessary nor appropriate" (*Sierra Club* v. *Costle, supra*, 657 F.2d at 390 n.450). The motions panel, however, had ordered EPA to submit affidavits concerning some of the meetings; the only information required to be set forth in the affidavits was the identity of the meeting participants, a description of how the meetings came to be held, and the approximate length of each meeting (J.A. 25). These affidavits are apparently the "important disclosures of information" (EDF Br. 45) that justify an attorneys' fee award. An examination of even one such affidavit reveals how feeble is this claim. Omitting the purely formal parts of the affidavit, the affidavit describing the meeting with the President provided, in its entirety, as follows (J.A. 28):

> On April 30, 1979, EPA officials briefed the President and Executive Branch officials on the issues and options presented by the rulemaking. The briefing was held on EPA's initiative, as part of the Agency's policy of briefing the Executive Branch on major EPA actions. It lasted about one hour. It was attended by the following persons: President Carter; James Schlesinger, Secretary of Energy; Charles Schultze, Chairman of the Council of Economic Advisors; Charles Warren, Chairman of the Council on Environmental Quality; Alfred Kahn of the White House Staff; Stu Eizenstat, Advisor to the President for Domestic Policy; Kitty Schirmer and perhaps Simon Lazarus of the President's Domestic Policy Staff; Jim McIntyre and Elliot Cutler of the Office of Management and Budget; Douglas Costle, EPA Administrator; myself; and other employees of the offices of the above persons, whose names I do not recall.

It is simply not credible to claim, as EDF does (at 44-45), that this affidavit and others like it constitute "important disclosures of information" sufficient to justify an award of attorneys' fees.[11] In addition to the fact that the affidavits contain virtually no information whatsoever, let alone "important" information, most of the meetings had already been disclosed in the rulemaking docket (*Sierra Club* v. *Costle, supra*, 657 F.2d at 404; see also *id.* at 387-389 & nn.429, 433-437, 439-440, 443-445, 448-449), and thus the affidavits disclosed little if anything new. And the court of appeals ruled that the two undocketed meetings were not of the type that had to be disclosed in the rulemaking docket in any event (*id.* at 404-408). There is no logic in awarding attorneys' fees for the "public service" of exposing information that the agency was under no obligation to disclose. To

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[11]EDF argues (at 44-45) that other courts have awarded fees to parties who did not ultimately prevail on the merits of their claims but did expose to the public and the court important information. The cases cited are all distinguishable in that the information disclosed had some intrinsic importance. For example, in both *Metropolitan Washington Coalition for Clean Air, supra*, 639 F.2d at 804, and *Citizens Association for Georgetown, supra*, 383 F.Supp. at 145, the courts found that the unsuccessful suits could have demonstrated to the public "a record of inaction and action delayed on the part of the District of Columbia government in implementing the Clean Air Act." In *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1007-1009 (2d Cir. 1975), the lawsuit resulted in the disclosure of financial statements that revealed, for the first time, that certain members of a partnership had been "borrowing" from the partnership; as a result of these and other revelations, limited partners were able to bring suit in state court alleging breaches of common law and statutory fiduciary duties. Finally, in *Sierra Club* v. *Lynn*, 364 F.Supp. 834, 850 (W.D. Tex. 1973), rev'd in part, 502 F.2d 43 (5th Cir. 1974), the district court found that plaintiffs' lawsuit "forc[ed] both the government and [the private developer] to do what they should have done of their own initiative in the first place * * *." Thus, plaintiffs were awarded fees not for the mere disclosure of information but for serving as a catalyst for the government's compliance with the relevant statutory mandates. In any event, the award of attorneys' fees in *Sierra Club* v. *Lynn*, which was decided before this Court's ruling in *Alyeska Pipeline Service Co., supra*, is clearly not good law because the court awarded fees on the basis of the "private attorney general" theory rejected in *Alyeska*. Anticipating this Court's ruling in *Alyeska*, the Fifth Circuit reversed the attorneys' fee award, noting in addition that it had "never assessed attorneys' fees against a party innocent of any wrongdoing" (502 F.2d at 65-66; footnote omitted).

be sure, disclosure of the information may have been necessary to litigate EDF's claims, but that fact alone is clearly insufficient to convert the disclosures into "public benefits" for which the government should be assessed fees.

(3) EDF also claims (at 45-47), as did the court of appeals (Pet. App. 18a-19a), that fees were justified because EDF's participation in this case provided "balanced representation" by environmental interests to offset the positions advocated by the industry representatives that participated in the litigation. In attempting to justify a fee award on this basis, both EDF and the court of appeals betray a serious misperception of the proper role of courts in reviewing agency rulemakings. In judicial review proceedings, courts may not substitute their judgment for that of the agency on the balance to be struck between competing policy considerations relevant to the rulemaking. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 555 (1978). Instead, the court's function is to ensure that the agency has complied with the substantive and procedural requirements of the governing statutes and the Constitution. *Id.* at 558. Whether EPA gave appropriate consideration to the various factors identified in Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, is to be determined by a review of the agency's rulemaking record, and not by the post-hoc arguments of competing interest groups participating in judicial review. Only if it were the function of the court to second-guess EPA's policy decisions would it be necessary for the court to encourage the participation of a variety of different interest groups. Of course, that is not the proper role of the judiciary.

(4) Finally, EDF claims (at 47-49) that the government benefitted from its challenge because the resulting court opinion provided "important guidance to the executive branch concerning proper informal rulemaking procedures" (*id.* at 49) [12] In support of this contention, EDF relies on the

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[12]EDF has retreated somewhat from its bold claim (EDF Br. in Opp. 3) that the decision in this case caused the Office of Management and Budget to "alter" procedures for rulemaking throughout the entire

so-called "Stockman Memorandum" (J.A. 30-31), which outlines the roles of the Presidential Task Force on Regulatory Relief and the Office of Management and Budget in agency rulemakings. The text of the Stockman Memorandum belies EDF's exaggerated claims for it. The Memorandum states that "[i]n accordance with advice provided by the Department of Justice * * *," certain procedures would be followed in providing factual material for agency rulemakings (J.A. 31). The Memorandum then notes as an "additional" matter that the procedures "will be consistent with the holding" of *Sierra Club* v. *Costle, supra*, 657 F.2d at 298. There is good reason for this consistency, because both OMB and the court of appeals relied on the same opinion issued by the Justice Department's Office of Legal Counsel. See Memorandum Opinion for the Secretary of the Interior, No. 79-5, 3 Op. Off. Legal Counsel 21 (1979); *Sierra Club* v. *Costle, supra*, 657 F.2d at 405 n.520.[13] Thus, far from providing the entire Executive Branch with guidance for handling ex parte contacts in future rulemakings, EDF did no more than induce the court of appeals to endorse the government's own in-house legal advice that predated the merits decision in this case. An attorneys' fee award premised on the "benefits" of the Stockman Memorandum, therefore, is tantamount to charging the government for the privilege of having a court cite with approval the Justice Department's own legal opinions.

Executive Branch, an assertion for which there was no support whatsoever. The court of appeals made much more modest claims for its decision, stating that the opinion had "apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings" (Pet. App. 18a). As we show above, even the court of appeals' assessment is overstated.

[13]We are advised by OMB that the Stockman Memorandum's mention of "advice provided by the Department of Justice" referred only to the above-cited Office of Legal Counsel opinion, and not to any advice given as a result of the court of appeals' decision in this case.

In short, the purported "public benefits" conferred by this litigation are wholly illusory and certainly do not rise to the level of meaningful public contributions that Congress intended to subsidize. Accordingly, the court of appeals' fee award based on these "benefits" was an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1983

DOJ-1983-04

No. 82-242-CFX
Status: GRANTED

Title: Administrator, Environmental Protection Agency, Petitioner
v.
Sierra Club, et al.

Docketed:
August 11, 1982

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Kennedy, Bingham, Brecher, Joseph J., Tyler, Jr., Harold R.

Entry	Date	Note	Proceedings and Orders
1	Aug 11 1982	G	Petition for writ of certiorari filed.
3	Sep 3 1982		Order extending time to file response to petition until September 27, 1982.
4	Sep 16 1982		Brief of respondent Sierra Club in opposition filed.
5	Sep 28 1982		Brief of respondent Environmental Defense Fund in opposition filed.
6	Sep 29 1982		DISTRIBUTED. October 15, 1982
7	Oct 7 1982	X	Supplemental brief of respondent Environmental Defense Fund filed.
8	Oct 13 1982	X	Reply brief of petitioner filed.
9	Oct 18 1982		Petition GRANTED.
			**********
10	Dec 2 1982		Brief of petitioner filed.
11	Dec 2 1982		Joint appendix filed.
13	Dec 23 1982		Order extending time to file brief of respondent on the merits until January 7, 1983.
14	Jan 7 1983		Brief of respondent Environmental Defense Fund filed.
15	Jan 11 1983		Brief of respondent Sierra Club filed.
17	Jan 19 1983	D	Motion of respondents for leave to file motion for divided argument, out-of- time, filed.
18	Jan 19 1983	N	Motion of respondents for divided argument filed.
19	Jan 25 1983		CIRCULATED.
20	Feb 22 1983		Motion of respondents for leave to file motion for divided argument, out-of- DENIED.
21	Feb 25 1983		Record filed.
22	Feb 25 1983		Certified original record, documents 1-156, 2 boxes, received.
23	Mar 11 1983	D	Motion of respondent Environmental Defense Fund for reconsideration of order of February 22, 1983, denying leave to file motion for divided argument, out-of-time, filed.
25	Mar 21 1983		Motion of respondent Environmental Defense Fund for reconsideration of order of February 22, 1983, denying leave to file motion for divided argument, out-of-time, DENIED.
26	Mar 24 1983		SET FOR ARGUMENT. Monday, April 25, 1983. (1st case) 1 hour
27	Apr 8 1983	X	Reply brief of petitioner filed.

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Entry	Date	Note	Proceedings and Orders
28	Apr 25 1983		ARGUED.